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# COMMENTS

## RIGHTS OF THE MARYLAND PROBATIONER: A PRIMER FOR THE PRACTITIONER

*Until relatively recently, persons placed on probation were denied even the most basic of due process protections. Beginning in the late 1960's, a series of Supreme Court decisions made it clear that many of the rights afforded the average citizen were equally applicable to the probationer. Since that time the rights afforded the Maryland probationer have expanded greatly. This comment presents the current state of those rights and its author concludes that although burdened by many restrictions, the Maryland probationer is nonetheless in an advantageous position when compared with his counterpart in other jurisdictions.*

### I. INTRODUCTION

Probation<sup>1</sup> is the most frequently utilized correctional alternative in the criminal justice system.<sup>2</sup> In 1980, nearly 40,000 persons were on supervised probation in Maryland,<sup>3</sup> representing an increase of 100% over the previous six years.<sup>4</sup> The current prison overcrowding crisis<sup>5</sup>

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1. Probation is defined by the Maryland Division of Parole and Probation as "a conditional release ordered by the court in a criminal case, requiring in most instances, community supervision." DIV. OF PAROLE AND PROBATION, MD. DEP'T OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, COMMUNITY SUPERVISION PROGRAM GUIDE 3 (1980) [hereinafter cited as PROGRAM GUIDE]. Probation is to be distinguished from parole, which is a conditional release of an offender from prison for the completion of a determinate sentence while under supervision in the community. *Id.* The scope of this comment is restricted to probation matters. It should be noted, however, that in most instances what is true for probation cases is equally true for parole cases. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).
  2. See *Nelson v. Collins*, 455 F. Supp. 727, 730 n.6 (D. Md.) (83% of convictions in Maryland result in probation), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978). See generally Cohen, *Sentencing Probation and Rehabilitation Ideal: The View from Mempa v. Rhay*, 47 TEX. L. REV. 1, 26 (1968).
  3. Compare DIV. OF PAROLE AND PROBATION, MD. DEP'T OF CORRECTIONS AND CORRECTIONAL SERVICES, MD. DIV. OF PAROLE AND PROBATION ANNUAL REPORT 16 (1979) [hereinafter cited as 1979 ANNUAL REPORT] with DIV. OF PAROLE AND PROBATION, MD. DEP'T OF CORRECTIONS AND CORRECTIONAL SERVICES, MD. DIV. OF PAROLE AND PROBATION ANNUAL REPORT 21 (1980) [hereinafter cited as 1980 ANNUAL REPORT]. Note that supervised probation is considerably different from unsupervised probation. Supervised probation is what is generally meant when the term "probation" is used. Unsupervised probation is most often used for minor traffic offenses. The only requirement of this type of probation is that the defendant not commit a new offense. However, unless the presiding judge also orders that a record check be performed near the end of the probationary period, it is unlikely that the court will ever become aware of a breach of probation.
  4. 1979 ANNUAL REPORT, *supra* note 3, at 16.
  5. In 1978, there were 8,308 inmates for 5,553 beds. MD. DEP'T OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, DIV. OF CORRECTIONS ANNUAL REPORT 18 (1978). In the cases of *Nelson v. Collins*, 455 F. Supp. 727 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978), and *Johnson v. Levine*, 450 F. Supp. 648 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978), the United States District Court for the

and the considerable monetary savings realized by using a community-based program such as probation<sup>6</sup> account for these statistics. Probation, however, is by no means a new concept.<sup>7</sup> It emerged in the nineteenth century as part of an egalitarian movement that found rehabilitation a more satisfactory solution to crime than the retributive approach of the past.<sup>8</sup> In 1879, the first statewide probation system was established in Massachusetts.<sup>9</sup> Maryland followed suit a few years later and became the second jurisdiction in the United States with a statewide probation program.<sup>10</sup>

Common to all probation systems has been the requirement that a

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District of Maryland ruled that such overcrowding constituted cruel and unusual punishment and ordered the Maryland prisons to discontinue the "double ceiling practice." Since the annual cost for housing an inmate is \$7,284, and since it would require an estimated \$25,000 to \$50,000 in construction costs to create space for an additional prisoner, it is unlikely that such overcrowding will be alleviated in the near future. *Rhodes v. Chapman*, 452 U.S. 337, 357 (1981) (Brennan, J., concurring). Note that under the ruling in this case, double ceiling is not per se violative of the eighth amendment but is only one factor to consider in deciding whether the conditions of confinement are cruel and unusual. *Id.* at 348-50.

6. In fiscal year 1980, the average cost of supervising an individual on probation supervision was nearly twenty times less than the cost of maintaining him in a correctional facility. *See* MD. DEP'T OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, DIV. OF CORRECTIONS ANNUAL REPORT 24 (1980). The cost per person for probation is only \$375 per year. *See* Planning Research and Evaluation Unit of Parole and Probation, 1980 Statistics (April 16, 1981) (unpublished) (copy available in Law Review Office, University of Baltimore School of Law).

Furthermore, of all the remedial approaches utilized in the correctional process, probation appears to be one of the few areas that has demonstrated some degree of success. *See* Martinson, "What Works?—Questions and Answers About Prison Reform," 35 PUBL. INTEREST 22-54 (1974). According to statistics compiled by the Maryland Division of Parole and Probation, only 6.4% of the individuals under supervision are arrested for a serious crime during the period of supervision. Of them, only 18.8% are rearrested and of these only 4.6% involve arrests for serious crimes. *See* Maryland Division of Parole and Probation, Press Release—Response to Commissioner's Report on Crime in Baltimore City (Jan. 21, 1981) (copy available in Law Review Office, University of Baltimore School of Law). It should be noted, however, that probation has a short term effect on recidivism; of those persons completing probation, 22.2% are rearrested within 12 to 15 months. *See* MD. DEP'T OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, DIFFERENTIATED CASELOAD MANAGEMENT SYSTEM, REPORT TO THE LEGISLATIVE POLICY COMMITTEE MARYLAND GENERAL ASSEMBLY III-15 (1979). In addition, any statistics compiled on Maryland probationers are likely to be optimistic in that 76.1% of all persons on probation are there as a result of having committed a non-serious offense. *See* Md. Div. of Parole and Probation, 1979 Statistics 1-2 (1980) (unpublished) (copy available in Law Review Office, University of Baltimore School of Law). "Serious offenses," in terms of these statistics, include homicide, rape, robbery, aggravated assault, and burglary. *Id.*

7. G. KILLINGER, H. KERPER & P. CROMWELL, *PAROLE AND PROBATION IN THE CRIMINAL SYSTEM* 17-38 (1976) [hereinafter cited as KILLINGER]; S. RUBIN, H. WEIHOFFEN, G. EDWARDS & S. ROSENZWEIG, *THE LAW OF CRIMINAL CORRECTIONS* 176-79 (1976) [hereinafter cited as RUBIN].
8. KILLINGER, *supra* note 7, at 17-38; RUBIN, *supra* note 7, at 176-79.
9. Mutter, *Probation in the Criminal Court of Baltimore City*, 17 MD. L. REV. 309, 310 (1954).
10. *Id.*; Law of April 6, 1894, ch. 402, § 304A, 1894 Md. Laws 583.

probationer abide by certain rules or restrictions while under probation supervision.<sup>11</sup> More often than not, these rules infringed on the individual's liberty to a degree that would constitute an unwarranted intrusion on the rights of the average citizen.<sup>12</sup> In addition, until recently the conditional liberty granted a probationer could be revoked at any time, with little or no procedural due process protection afforded him.<sup>13</sup>

Over the years, a number of theories have been advanced for justifying the denial of the probationer's constitutional rights. The two most prominent theories are the grace or privilege theory and the *parens patriae* theory.<sup>14</sup> Under the grace theory, release under supervision was viewed as a privilege and not a right and thus entitled the court or grantor to condition the gift of probation upon the recipient's accepting certain restrictions to his liberty.<sup>15</sup> The *parens patriae* theory, on the other hand, justified the denial of certain rights on the grounds that they were necessary for carrying out the humanitarian goal of rehabilitation.<sup>16</sup>

In more recent years, both of these theories have come under attack. In a series of decisions between 1969 and 1973, the United States Supreme Court indicated its dissatisfaction with these theories, particularly when they were used to justify denial of due process protection at a revocation of probation hearing.<sup>17</sup> Since that time, the rights of the Maryland probationer have increased greatly, not only in the realm of the revocation hearing but in all phases of the probation process. This

11. See generally KILLINGER, *supra* note 7; RUBIN, *supra* note 7.

12. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972).

13. *E.g.*, *Escoe v. Zerbst*, 295 U.S. 490 (1935).

14. Fisher, *Parole and Probation Revocation Procedure After Morrissey and Gagnon*, 65 J. CRIM. L. & CRIMINOLOGY 46 (1974) [hereinafter cited as Fisher]. Two other justifications are the contract theory and the custody theory. The basic premise of the contract theory is that the offender, who must sign an agreement specifying the conditions of his liberty, is in the same position as any other party to a written contract with the state and is therefore estopped from later complaining about its terms. *Id.* at 47. Some courts have criticized this view by pointing out that "Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the State." *Hahn v. Burke*, 430 F.2d 100, 104 (7th Cir. 1970), *cert. denied*, 402 U.S. 933 (1971); *accord*, *State v. Oyler*, 436 P.2d 709, 712 (Idaho 1968). Regardless of whether the conditions of the order of probation constitute a valid contract, the term "contract" is still the term most often used in Maryland to describe the order of probation. Interview with Fifteen Supervision Agents, Maryland Division of Parole and Probation, in Silver Spring, Md. (Jan. 6, 1982) [hereinafter cited as Interview with Supervision Agents].

The basic premise of the custody theory is that the offender is a "quasi-prisoner" and thus is still considered to be in "custody." This theory has been criticized for a variety of reasons. One criticism is that a probationer is not entitled to credit for time spent on probation, and it is therefore difficult to equate it with the time spent in incarceration. Fisher, *supra* note 14, at 47.

15. Fisher, *supra* note 14, at 47.

16. *Id.* at 48.

17. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); see *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970); *In re Gault*, 387 U.S. 1, 17-18 (1967).

comment examines the current status of the rights of the Maryland probationer as they exist within the three fundamental phases of probation: disposition, supervision, and revocation.

## II. DISPOSITION

### A. Pre-Sentence Investigation

Although probation occurs at the post-adjudicatory phase of a criminal trial,<sup>18</sup> a defendant's first contact with the probationary process is likely to occur prior to the final disposition of his case. In one-third of all Maryland cases, a Pre-Sentence Investigation (PSI) is conducted.<sup>19</sup> This investigation, which is performed by an agent of the Division of Parole and Probation, is a social history of the probationer.<sup>20</sup> The report familiarizes the court with the character and abilities of the person being evaluated for probation and considers if the individual will be able to comply with the conditions of probation.<sup>21</sup>

Because a PSI is conducted after adjudication, it may contain any information deemed pertinent in arriving at a just disposition.<sup>22</sup> However, the defendant has no constitutional right to have the contents of the report disclosed to him even though the information may be detrimental to his interests.<sup>23</sup> Nevertheless, Maryland law has for many years permitted partial disclosure of derogatory information so as to

18. In certain rare instances, a defendant may be supervised by an agent of the Division of Parole and Probation prior to trial, as a condition of his pretrial release. MD. R.P. 721(b)(2). The defendant, however, has not technically been placed on probation. *Id.* 775.

19. MD. DIV. OF PAROLE AND PROBATION EXPANDED SUPERVISION TEAM, EVALUATION REPORT ON THE CRIMINAL INVESTIGATION PROGRAM OF THE MD. DIV. OF PAROLE AND PROBATION 5 (1980) (copy available in Law Review Office, University of Baltimore School of Law). A PSI is performed in 4% of all district court cases and in 45% of all circuit court cases. Percentages vary from county to county, with Montgomery and Prince George's having the highest percentages and Baltimore City the lowest. *Id.* Maryland does not require the preparation of a PSI report to assist the court in making its determination of whether to grant probation. Ordering such reports is within the discretion of the court. MD. R.P. 771(a); see *Turner v. State*, 5 Md. App. 584, 593-94, 248 A.2d 801, 807 (1978). It should be noted that PSI's may be ordered to assist the court in deciding whether to accept a plea of *nolo contendere*. MD. R.P. 733(c)(1).

20. See MD. DEP'T OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, AGENT'S MANUAL, DIVISION OF PAROLE AND PROBATION IV-3 to -24 (1980) [hereinafter cited as AGENT'S MANUAL].

21. *Id.* at IV-3.

22. *Williams v. New York*, 337 U.S. 241, 246 (1949). The PSI may also include a defendant's juvenile record. *Bingham v. State*, 285 Md. 59, 61-65, 400 A.2d 765, 767-68 (1979). Even juvenile records that have been sealed may be included in the PSI, and access to these records, according to an opinion of the Attorney General's Office, may be obtained without a court order. 63 Op. Md. Att'y Gen. 502, 508-09 (1978). Nevertheless, in Montgomery County, permission from a Juvenile Court Master is still required before a PSI agent is permitted access to a sealed juvenile file. Interview with Robert Ulino, Supervisor of the Rockville PSI Unit, Md. Div. of Parole and Probation, in Rockville, Md. (Nov. 18, 1980).

23. See *KILLINGER*, *supra* note 7, at 61-66.

afford the defendant the opportunity to refute or discredit such information.<sup>24</sup> More recently, this right has been expanded to its fullest extent. Today, the defendant receives a copy of the entire report, including any recommendation by the investigator as to the defendant's suitability for probation supervision.<sup>25</sup> In addition, the report must be received by the defendant sufficiently prior to sentencing so as to afford him a reasonable opportunity to investigate the information contained in the report.<sup>26</sup> No longer will defense counsel have to appear in the courthouse on the morning of sentencing to obtain a copy of the report.<sup>27</sup>

### B. Granting Probation

If the judge concludes that probation is warranted,<sup>28</sup> he has the option of granting probation in one of four different forms. In most cases in which probation is granted, the court will impose a sentence, which could be a period of incarceration,<sup>29</sup> a fine, or both. The court

24. Md. R.P. 761(d)(1963). In many jurisdictions, the defendant is permitted either no access to the report or access only to selected sections of the report. See KILLINGER, *supra* note 7, at 61-66. For example, under federal law, the investigator's recommendation regarding the defendant's suitability for probation is not subject to review by the defendant or his counsel. *Id.* at 66. Prior to 1978, Maryland had a similar provision. Md. R.P. 761(d) (1977).

25. MD. R.P. 771(b).

26. *Id.* The report is not, however, a matter of public record. Its contents are still considered confidential in nature and protected by art. 41 of the Maryland Annotated Code. MD. ANN. CODE art. 41, § 124(b) (Supp. 1981); see MD. R.P. 771(b). See also KILLINGER, *supra* note 7, at 66-67.

27. Bennett, *An Overview of the New Maryland Criminal Rules*, in USING THE MARYLAND CRIMINAL LAW 6 (1981). Such unlimited disclosure has received sharp criticism. It has been argued that unrestricted disclosure of all information contained in the PSI report causes persons interviewed by the PSI agent to withhold information derogatory to the defendant out of fear of reprisal. Under such circumstances, the PSI report may be less than a completely accurate account of the defendant's social history. In addition, delays might result since the defendant may challenge everything in the report and thereby transform the sentencing procedure into a new trial of facts. See KILLINGER, *supra* note 7, at 63.

28. The granting of probation is solely within the discretion of the judge. MD. ANN. CODE art. 27, § 641A (1976); see *State v. Wooten*, 277 Md. 114, 116, 352 A.2d 829, 831 (1976). However, probation may not be granted for the following: (1) third conviction of a crime of violence in which at least one prior term of incarceration has been served, MD. ANN. CODE art. 27 § 643B(c) (Supp. 1981) (mandatory twenty-five-year sentence); (2) use of a handgun in the commission of a felony or crime of violence, *id.* § 35B(e) (1976); and (3) any second conviction under section 36B for the illegal wearing, carrying or transporting of a handgun. *Id.* § 36B.

A judge may, unless specifically precluded by statutory enactment, grant probation for the conviction of a crime that carries a life sentence. *State v. Wooten*, 277 Md. at 116-17, 352 A.2d at 831. Even section 643B(b), which requires a mandatory life sentence for a fourth conviction of a crime of violence without the possibility of parole, technically does not preclude a judge from suspending the execution of the sentence and granting probation, since the statute only requires that a mandatory life sentence be imposed and not that it be executed. MD. ANN. CODE art. 27, § 643B(b) (1976). Of course, it is unlikely that this will occur.

29. MD. ANN. CODE art. 27, § 705(f) (1976). Article 27 of the Maryland Annotated

will then suspend the execution of the sentence<sup>30</sup> and place the offender under supervised probation for a specified length of time.<sup>31</sup>

A second form of probation, known as split sentence,<sup>32</sup> results in suspension of only part of the imposed sentence. The defendant serves the unsuspended portion of the sentence and, upon completion of that portion of the sentence, he is placed under probation supervision.<sup>33</sup> The split sentence, although viewed as the most effective form of probation in terms of reducing offender recidivism,<sup>34</sup> has nonetheless created some confusion over how it should be administered. Until the recent decision of *Cephas v. State*,<sup>35</sup> an offender who was released on parole prior to completion of the unsuspended portion of his sentence would find himself under both parole and probation supervision.<sup>36</sup>

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Code precludes a judge from sentencing any person to jail or to a local detention center for more than eighteen months and precludes him from sentencing a person to the Division of Corrections for less than three months. *Id.* § 690.

30. There is an important distinction between imposition of sentence and execution of sentence. Until the imposed sentence is executed, the defendant will remain free. *See* KILLINGER, *supra* note 7, at 17.
31. Under article 27 of the Maryland Annotated Code, the period of probation may exceed the period of incarceration imposed. MD. ANN. CODE art. 27, § 641A (Supp. 1981). However, when the district court has jurisdiction, the period of probation may not exceed three years, *id.* § 643A (1976), and when the circuit court has jurisdiction, it cannot exceed five years. *Id.* § 641A (Supp. 1981). *But see* MD. ANN. CODE art. 27, § 641A (Supp. 1981) (an exception to these limits is permitted for the purpose of paying restitution).  
Under rule 775(b) of the Maryland Rules of Procedure, the period of probation may be modified at any time. An increase, however, requires a hearing and cannot exceed the statutory maximums. *Kupfer v. State*, 287 Md. 540, 543-44, 414 A.2d 907, 908 (1980). Nevertheless, a question exists as to whether consecutive five-year probationary terms may be imposed when the defendant is found guilty of more than one offense. The Attorney General's Office of Maryland has suggested that this would be permissible. 61 Op. Md. Att'y Gen. 694 (1976).
32. The split sentence is often referred to as "shock probation," because the probationer does not escape incarceration and consequently experiences the shock of incarceration. *See* KILLINGER, *supra* note 7, at 76-77. For example, a defendant could be given a nine-month sentence with all but five months suspended and three years probation upon his release.
33. *Cephas v. State*, No. 89, slip op. at 2 (Md. Ct. Spec. App. Oct. 16, 1981).
34. Recidivism is the measurement used to determine the success in rehabilitating an offender. It refers to those offenders who commit new offenses. The split sentence form of probation appears to demonstrate the lowest level of recidivism of the various forms of probation used. *See* DIV. OF PUBLIC ADMINISTRATION, COLLEGE OF ADMINISTRATIVE SCIENCE, THE OHIO STATE UNIVERSITY, PROGRAM FOR THE STUDY OF CRIME AND DELINQUENCY, REPORT OF THE DIRECTOR, 1972-73, at 59-60 (1973), *cited in* KILLINGER, *supra* note 7, at 76-77.
35. No. 89 (Md. Ct. Spec. App. Oct. 16, 1981).
36. A person sentenced to less than 90 days is not eligible for parole. *See* MD. ANN. CODE art. 27, § 690(c) (Supp. 1981); *id.* art. 41, § 122(a). Any person receiving 90 days or more must be given a parole release hearing after serving one-quarter of his sentence. *Id.* Note, however, that nothing precludes the Parole Commission from paroling an inmate (under its jurisdiction) on the first day that the inmate is incarcerated. As a practical matter, however, this is almost never done. The Parole Commission does not have jurisdiction over persons given a life sentence, *id.* § 122(b) (1976), persons retained in custody by the Patuxent Institute and any

This was due to the common practice of ordering probation to begin upon release from incarceration. Consequently, if that individual committed a new offense, a parole revocation hearing would be held for the time remaining on the unsuspended portion of his sentence, and a probation revocation hearing would be held for the suspended portion.<sup>37</sup> *Cephas*, however, ruled that probation supervision cannot start until the unsuspended portion of the sentence, including any period of parole supervision, has been completed.<sup>38</sup>

A third form of probation involves the use of a generally suspended sentence.<sup>39</sup> If this form is used, a finding of guilt is entered but no specific sentence is imposed.<sup>40</sup>

The last form of probation that could be granted in Maryland is known as Probation Before Judgment (PBJ).<sup>41</sup> This sentencing alternative is designed for first time offenders and is administered under two different sections of the Maryland Code. If the offense involves a violation of the Controlled Dangerous Substances Law,<sup>42</sup> *e.g.*, possession of marijuana, then article 27, section 292 applies.<sup>43</sup> For all other offenses, article 27, section 641 is applicable.<sup>44</sup> A disposition under either section provides the offender the opportunity to avoid the stigma of a criminal conviction.<sup>45</sup> Pursuant to these dispositions, the entry of guilt

juvenile committed to the Department of Juvenile Services. *Id.* § 126A (Supp. 1981).

37. It is important to distinguish a split sentence from incarceration as part of probation. The latter involves the imposition of a sentence and the execution of part of that sentence as a condition of the order of probation. Under such a plan, the individual would always be under probation supervision, even while incarcerated. Thus, jurisdictional problems may be encountered in the event that the inmate escapes from incarceration, since the court as well as the Parole Commission would appear to have jurisdiction over the individual. This problem was alleviated by the decision in *Stone v. State*, 43 Md. App. 329, 405 A.2d 345 (1979), which held that the judiciary may not make incarceration a "condition of probation." *Id.* at 336, 405 A.2d at 349.

In Montgomery County, however, it is possible for a judge to retain jurisdiction over an individual who has been ordered to serve his sentence at a local detention center, if that person has been granted work release under MD. ANN. CODE art. 27, § 645T (Supp. 1981). Consequently, a person who fails to perform properly at a work release facility (Pre-Release Center) may be ordered by the court to serve the balance of his sentence under the authority of the Division of Corrections. *See id.*

38. No. 89, slip op. at 2 (Md. Ct. Spec. App. Oct. 16, 1981).  
 39. MD. ANN. CODE art. 27, § 639 (Supp. 1981). Both the imposition and the execution of sentence are suspended. *See, e.g.*, *Knight v. State*, 7 Md. App. 313, 255 A.2d 441 (1969).  
 40. *See* MD. ANN. CODE art. 27, § 639 (Supp. 1981).  
 41. *Id.* §§ 292, 641 (1976 & Supp. 1981). The defendant must consent to this disposition in writing, and acceptance of it is considered a waiver of the right to appeal. *Id.* §§ 292(b), 641(a)(2).  
 42. *Id.* §§ 276-302 (1976).  
 43. *Id.* § 292 (1976 & Supp. 1981).  
 44. *Id.* § 641.  
 45. *Id.* §§ 292, 641 (1976). Because there is no formal finding of guilt, the defendant/probationer has no conviction and can honestly state on employment applications



is stayed and a period of probation imposed.<sup>46</sup> After the probationary period has been satisfactorily completed, the case is dismissed without an entry of guilt ever appearing on the record.<sup>47</sup> Furthermore, under a section 292 disposition, the arrest record can be expunged as soon as probation is completed.<sup>48</sup> Under a section 641 disposition, however, the arrest record cannot be expunged until three years after the original sentencing and, then, only if the court determines expungement to be warranted.<sup>49</sup> If the terms of probation are violated under either section, the court will strike the original disposition and enter a guilty verdict. A sentence is imposed and executed if the court finds the violation to be serious.<sup>50</sup>

Regardless of what form of probation an offender receives, an offender who appeals a sentence in which probation is granted must abide by the rules of his probation contract even while the appeal is pending. Although a seeming anomaly, probation is not technically considered a "sentence"; consequently, the trial court retains jurisdiction over any matters dealing with probation and may revoke probation even though the appeal process has not been completed.<sup>51</sup>

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that he has not been convicted of a crime. He does, however, have an arrest record, but even this may be expunged after he has completed the probationary period satisfactorily. G. LIEBMANN, MARYLAND PRACTICE: DISTRICT COURT LAW AND PRACTICE § 1021 (1976 & Supp. 1981) [hereinafter cited as LIEBMANN].

46. See LIEBMANN, *supra* note 45, § 1021. With respect to motor vehicle violations, a person receiving probation under section 641 has not been convicted of that offense and thus his driving privileges remain unaffected. See MD. TRANSP. CODE ANN. § 11-110(b) (1977).
47. LIEBMANN, *supra* note 45, § 1021.
48. *Id.* For a complete discussion of the expungement process in Maryland, see LIEBMANN, *supra* note 45, § 1021.
49. MD. ANN. CODE art. 27, § 737(c) (1976 & Supp. 1981). If the defendant is subsequently found guilty of another criminal offense, his request for expungement may be denied. Also note that the application for expungement must be filed within eight years from the date of judgment. *Id.*
50. The court may, of course, strike the PBJ, enter a guilty finding, but still not impose a sentence. See notes 39 & 40 and accompanying text *supra*.
51. *Minovich v. State*, 18 Md. App. 368, 377-78, 306 A.2d 642, 647, *cert. denied*, 269 Md. 763 (1973), *cert. denied*, 415 U.S. 930 (1974). The *Minovich* court used the following reasoning:

In *Bullock v. Director*, the Court pointed out "[a]n appeal to this Court from a *nisi prius* Court does not necessarily stay all further proceedings in the trial court, nor does it strip said court of all power over the proceeding in which the appeal has been taken. The trial court may act with reference to matters not relating to the subject matter of, or affecting, the proceeding." . . . The Supreme Court in *Berman v. United States*, while holding that an accused could not be resentenced during the pendency of an appeal, stated as follows: "Placing petitioner upon probation did *not* affect the finality of the judgment. Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered." Relying on this language, the Court in *United States v. Lindh* held specifically "while the District Court is without jurisdiction during the pendency of the appeal to modify that judgment it retained and still does retain, despite the pendency

### C. *The Conditions of Probation*

In granting probation, the Maryland courts automatically impose nine general conditions that the probationer must follow.<sup>52</sup> This comment discusses each of the nine conditions in turn.

of the appeal, the power to modify or suspend or otherwise deal with the terms of the petitioner's probation. Probation is separate and distinct from sentence."

*Id.* at 377, 306 A.2d at 647 (emphasis added) (citations omitted).

The *Minovich* case involved an appeal on the record from the Circuit Court for Montgomery County to the court of special appeals. Some doubt exists as to whether *Minovich* would apply in an appeal from the district court to the circuit court, which is *de novo* in nature. MD. CTS. & JUD. PROC. CODE ANN. § 12-401(c) (1980 & Supp. 1981). Based on the language used by the Third Circuit in *United States v. Lindh*, 148 F.2d 332, 333 (3d Cir. 1944), on which the *Minovich* court relied, 18 Md. App. at 377-78, 306 A.2d at 647, it seems that the Maryland district court would retain jurisdiction over any matter dealing with probation. Maryland District Court Rule 778(a) gives further support to this contention.

An appeal or [review by] any appellate court, including the Supreme Court of the United States, stays a sentence of imprisonment if the defendant is released pursuant to M.D.R. 776 (Release After Conviction). Any other sentence or order or condition of probation *may* be stayed upon terms the court deems proper.

MD. DIST. CT. R. 778(a) (emphasis added), *quoted in Stanton v. State*, 45 Md. App. 662, 665 n.1, 415 A.2d 305, 307 n.1 (1980). Thus, this rule permits the judge in a district court to stay the execution of probation but does not require him to do so. Consequently, it would appear that conditions of probation remain in effect while an appeal is pending unless the court specifically orders otherwise.

52. The standard Maryland order of probation or probation contract includes the following conditions:

1. Report to his Probation Agent as directed and follow his lawful instructions.
2. Work or attend school regularly as directed by his Probation Agent.
3. Get permission from his Probation Agent before:
  - a. changing his home address;
  - b. changing his job;
  - c. leaving the State of Maryland;
  - d. owning, possessing, using or having under his control any dangerous weapon or firearm of any description.
4. Obey all laws.
5. Notify his Probation Agent at once if arrested.
6. Permit his Probation Agent to visit his home.
7. Appear in Court when notified to do so.
8. Shall not illegally possess, use or sell any narcotic drug, "controlled dangerous substance" or related paraphernalia.
9. Shall pay, through the Division of Parole and Probation, the sum of \$

as follows:

Court costs of	\$	
Fine of	\$	
Attorney fee of	\$	to
whose address is		
Restitution of	\$	to
whose address is		
In such installments as the Division shall determine and direct or		
In installments of	\$	per

10. Special conditions as follows:

PROGRAM GUIDE, *supra* note 1, at 17.

In addition to these nine general conditions, the court may also impose any special conditions it deems appropriate so long as there exists a rational basis for their imposition.<sup>53</sup> Any objection by the de-

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Three-quarters of the other states have standard probation contracts that are more restrictive than Maryland's. The remaining states have contracts that are comparable and only two states, Connecticut and Delaware, have contracts more lenient than Maryland's. See *Compilation of Standard Probation Contracts* [hereinafter cited as *Compilation of Contracts*] (copy available in Law Review Office, University of Baltimore School of Law). Some conditions found in other standard probation contracts that are not found in the Maryland contract are, as follows: (1) absolute prohibition of the use of alcohol (Fla., Ga., Ill., N.J., Okla., and Tenn.); (2) prohibition against being present in a place that serves alcohol whether or not the probationer is actually imbibing (Ga., Ill., Okla.); (3) submission to alcohol and drug use testing (Iowa, Or.); (4) permission to drive a motor vehicle (Idaho, Ill., N.Y., S.D., Va., W. Va., Wis.); (5) permission to buy merchandise on credit (Idaho, Minn., Mont., Nev., S.D., Tenn., Wis., Wyo.); (6) permission to get married (Ala., Idaho, Minn., Nev., S.D., Tenn., W. Va., Wyo.); (7) permission to file for divorce (Wyo.); (8) curfew (Colo., Ill., Tenn.); (9) warrantless searches and seizures of the probationer's person, automobile and residence (Ariz., Cal., Mont., Neb., N.C., S.D., Wis.); (10) requirement that the probationer answer all questions propounded to him and to do so truthfully (Fla., Ill., Maine). *Id.*

53. *Watson v. State*, 17 Md. App. 263, 274, 301 A.2d 26, 31-32 (1973). In addition to the rights given up as a result of court-imposed probation conditions, the mere fact of being convicted of a crime may have numerous collateral effects. For instance, most jurisdictions have civil disability statutes that automatically preclude the person convicted of a crime from engaging in certain enumerated activities for the rest of his life. See Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970). Depending on the nature of the crime committed, a person may be precluded from some or all of the following: right to vote; right to bring a civil suit; right to sit as a juror; right to contract; right to own property; right to hold public office; and the right to obtain certain professional licenses. *Id.*

Maryland lacks any comprehensive civil disability statute. However, there are isolated statutory and constitutional provisions restricting some of these rights. For example, a person convicted of two crimes of theft or two infamous crimes cannot vote. MD. ANN. CODE art. 33, § 3-4(c) (Supp. 1980). The term "infamous crimes" has never been defined by the legislature. Its meaning has been addressed by the Office of the Attorney General and by the United States District Court for the District of Maryland. 60 Op. Md. Att'y Gen. 245 (1975); *Thiess v. State Administrative Bd. of Election Laws*, 387 F. Supp. 1038, 1040 (D. Md. 1974). If a person has committed only one crime, he still may not vote unless any sentence imposed has been satisfied and any term of probation completed. MD. ANN. CODE art. 33, § 3-4(c) (Supp. 1980). A person in Maryland is not precluded from holding public office unless he has been convicted of bribery, MD. CONST. art. III, § 50, or of buying and selling votes. *Id.* art. I, § 6.

With respect to occupational licenses, a criminal record certainly may be considered in making the determination of whether a taxicab license should be issued. See, e.g., *Kaufman v. Baltimore City Police Dep't Taxicab Bureau*, 236 Md. 476, 484, 204 A.2d 521, 525 (1964), *cert. denied*, 382 U.S. 849 (1965). Nevertheless, it seems clear that disqualification must bear some rational connection to an applicant's fitness to perform the particular function. The exclusion of a convicted person from regular employment opportunities without a consideration of the nature of his offense would seem to violate the due process clause of the United States Constitution. See Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1201-02 (1970). For a discussion of the require-

defendant to the conditions imposed can only be brought by appeal from the original judgment.<sup>54</sup> Consequently, the probationer who waits to challenge the legality of a condition until after he has been found to have violated that condition may be precluded from raising this issue on appeal.<sup>55</sup>

### III. SUPERVISION

The process of administering the conditions outlined in the probationer's contract is known as supervision.<sup>56</sup> Whether certain conduct will be considered a violation of the contract is a function of three factors: (1) the discretion given the supervising agent; (2) operational standards dictated by management personnel of the Division of Parole and Probation,<sup>57</sup> and (3) judicial interpretation of the scope of the conditions in the probation contract. This portion of the comment will therefore examine the implementation and enforcement of the conditions found in the standard Maryland probation contract.

#### A. General Conditions

##### 1. Rule #1 — Report to Agent as Directed and Follow His Lawful Instructions

###### a. Report to Agent as Directed

Depending on the seriousness of the offense, the probationer's prior record, and any psychological imbalances, the probationer will be assigned to one of three categories of supervision: intensive (maximum

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ment that a probationer resign from a profession as a condition of his probation, see Jaffe, *Probation with a Flair: A Look at Some Out-of-the Ordinary Conditions*, FED. PROBATION, Mar. 1979, at 27-29 [hereinafter cited as Jaffe]. The question of whether a disposition can be used to deny occupational licensing has yet to be addressed.

54. *Finnegan v. State*, 4 Md. App. 396, 403, 243 A.2d 36, 41 (1968). This seems inherently unfair since the defendant is frequently placed in a "take it or leave it" situation at the time that the conditions of probation are imposed. See *State v. Olyer*, 436 P.2d 709, 712 (Idaho 1968).

55. *Finnegan v. State*, 4 Md. App. 396, 403, 243 A.2d 36, 41 (1968). Nevertheless, a probationer who has had his probation revoked is not totally without remedy. He may file an appeal from the revocation hearing for the purpose of determining whether the judge has abused his discretion or whether an erroneous construction has been placed by the trial judge on the conditions of probation. *Swan v. State*, 200 Md. 420, 425-26, 90 A.2d 690, 692 (1952). In addition, if probation has been revoked on the basis of what the defendant considers to be an unconstitutional condition, he can probably seek relief through writ of habeas corpus. See *Dollinger v. Milligan*, 552 F.2d 1220 (7th Cir. 1977) (condition precluding the probationer from seeing family members viewed as unconstitutional).

56. Interview with Supervision Agents, *supra* note 14.

57. AGENT'S MANUAL, *supra* note 20. This manual is presently being updated. Current changes to the AGENT'S MANUAL are found in the PROGRAM GUIDE, *supra* note 1. No official regulations have been promulgated to date; therefore, the policies dictated in these manuals lack the power of law. They are, nevertheless, the "official policies" of the Division of Parole and Probation and are therefore adhered to strictly.

supervision), stand-by (medium supervision), and honors (minimum supervision).<sup>58</sup> The probationer's reporting requirements will vary depending upon the category of supervision assigned.

The intensive category is reserved for those offenders convicted of murder, rape, robbery, arson, and serious narcotic offenses.<sup>59</sup> Persons with psychological or emotional imbalances are also placed in the intensive category.<sup>60</sup> A person placed in this category will be required to meet with his agent at least twice each month,<sup>61</sup> and the agent will be required to visit the probationer's home at least once each month for the purpose of conversing with either the probationer or a family member.<sup>62</sup> Verification of employment and attendance at prescribed counseling programs is also required on a monthly basis.<sup>63</sup> Finally, in order to determine if the probationer has committed any new offenses, a record check must be performed once every three months.<sup>64</sup> A person will remain in this category for one year and will then be moved to either stand-by or honors status, depending upon his conduct during the first year.<sup>65</sup>

Individuals are assigned to the medium level of supervision, stand-by, if they have committed a less serious offense such as larceny, common assault, forgery, fraud, and minor narcotic offenses.<sup>66</sup> The stand-by probationer is expected to report to the agent in person once every

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58. PROGRAM GUIDE, *supra* note 1, at 19.

59. *Id.* at 20-21.

60. *Id.* at 21.

61. *Id.* at 28.

62. *Id.*

63. Agents can verify employment by reviewing pay stubs rather than by contacting the employer. This is done frequently when the employer is unaware of the probationer's record and the employment is not inappropriate in light of the nature of the conviction. Survey of Fifty Randomly Selected Agents of the Division of Parole and Probation for the State of Maryland (Nov. 1980-Feb. 1981) [hereinafter cited as Survey] (results available in Law Review Office, University of Baltimore School of Law). Sampling represented 11 different counties and 18 different offices. All agents had at least one year of experience in supervision work, with the average experience being 6.4 years. The survey itself consisted of 26 questions of the true/false variety with space left for explanations. The sample means were .92 or higher in all questions, with a 95% confidence level when calculated to within  $\pm 0.1$  of the actual means.

64. PROGRAM GUIDE, *supra* note 1, at 28. Record checks are done once every six months in the medium and minimum categories of supervision. *Id.* at 33, 35.

65. *Id.* at 29. After a person has satisfactorily completed one year of maximum supervision, he is placed in the medium category for one year. After completing the second year of supervision, the agent will generally request that the court terminate supervision at that time. *Id.* at 46. In some instances, a person who performs very well under maximum supervision will be moved directly to minimum supervision. Regardless of the category to which a probationer is moved, the following requirements must be met before a change in the category is permitted: (1) no pending criminal charges; (2) no conviction for any criminal offense during the previous year; (3) payment of all court-ordered fines, costs, and restitutions current with the agreed payment schedule; and (4) all special conditions either satisfied or being complied with. *Id.* at 29.

66. *Id.* at 31. Medium supervision is also required if the court orders that a significant

other month and by telephone each intervening month.<sup>67</sup> More than half of all cases are placed in this category.<sup>68</sup>

The honors category is used for persons who have committed minor offenses such as loitering, disorderly conduct, gambling, and traffic violations not involving drug or alcohol use.<sup>69</sup> The probationer must meet with the agent once every three months and, on intervening months, the probationer is required to complete and mail to the agent a standardized form on which he must note any changes in his home or employment status.<sup>70</sup> Record checks are performed only once every six months for the honors and the stand-by probationers.<sup>71</sup>

*b. Follow Agent's Instructions*

Rule 1 also requires that the probationer follow his agent's lawful instructions. This implies that the agent may modify the conditions of probation without having to go through the formality of a court hearing. Although this would seem to grant the agent almost unlimited discretion, the Court of Special Appeals of Maryland in *Phelps v. State*<sup>72</sup> restricted the degree of discretion that may be used by a Maryland probation agent.<sup>73</sup> In *Phelps*, a probation agent ordered one of his clients to enroll in a residential drug treatment facility.<sup>74</sup> The court of special appeals ruled that the agent did not have the authority to impose such a condition,<sup>75</sup> stating that an agent's power is restricted to directives involving "everyday activities in the home environment."<sup>76</sup> Unfortunately, the Maryland courts have not explicitly defined this phrase. Consequently, some agents continue to use rule 1 to impose new conditions without holding a hearing.<sup>77</sup>

Among the most common conditions imposed by supervising

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amount of restitution, court costs, or fines be paid through the Division of Parole and Probation. *Id.*

67. *Id.*

68. GOVERNOR'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, CRIMINAL AND JUVENILE JUSTICE SYSTEM STATISTICS NO. 14, at 41 (1977) (copy available in Law Review Office, University of Baltimore School of Law). The percentage of probationers in the other categories is 32% for intensive/maximum and 17% for honors/minimum. *Id.*

69. PROGRAM GUIDE, *supra* note 1, at 35.

70. *Id.*

71. *Id.* at 33, 35. The assignment of clients to these various categories is known as the Caseload Management System and is designed to give the maximum amount of supervision to those clients most in need of it. *See id.* at 1-2.

72. 17 Md. App. 341, 303 A.2d 430 (1973).

73. *Id.* at 344, 303 A.2d at 431.

74. *Id.* at 343, 303 A.2d at 431.

75. In *Phelps*, the agent ordered the probationer to become a ward of X-Cell House, a residential treatment program for drug rehabilitation. *Id.*

76. The *Phelps* court stated, "[W]hile we need not undertake to define its scope, it appears to apply to everyday experiences of a probationer's conduct in his home environment, including required prohibited activities." *Id.* at 344, 303 A.2d at 431.

77. Survey, *supra* note 63.

agents are directives to submit to urinalyses or to participate in psychological counseling.<sup>78</sup> Abstinence from the consumption of alcohol is also a frequently imposed condition.<sup>79</sup> Although the last of these agent-imposed conditions seems to meet the *Phelps* test, the first two probably would not, since they are not activities generally associated with the probationer's "home environment."

Finally, although the *Phelps* court failed to define the specific scope of an agent's authority,<sup>80</sup> it did suggest that rule 1 be construed narrowly in deference to the eight other general conditions and any court-imposed special conditions.<sup>81</sup>

## 2. Rule #2 — Work or Attend School Regularly

Pursuant to rule 2, a probationer must be employed full-time. Part-time attendance at school combined with part-time work, however, is viewed by most agents as satisfying this requirement.<sup>82</sup> In addition, during economic recessions, when rates of unemployment are high, agents are reluctant to seek a revocation hearing simply because a probationer is unemployed, particularly if the probationer has demonstrated a sincere effort to obtain employment.<sup>83</sup>

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78. *Id.* For further discussion on urinalysis, see notes 112-20 and accompanying text *infra*.

79. Survey, *supra* note 63. Ordering a probationer to abstain from alcohol may be unreasonable if the probationer is a chronic alcoholic. Annot., 37 A.L.R. FED. 843 (1978); see, e.g., *Sweeney v. United States*, 353 F.2d 10, 11 (7th Cir. 1965); *State v. Oyler*, 436 P.2d 709, 712 (Idaho 1968).

80. See note 76 *supra*.

81. The court stated that "[i]f a probationer must, without limitation, conform to all rules of conduct imposed by the probation agent, then the other [eight] general conditions, and any special conditions would be superfluous." 17 Md. App. 341, 344, 303 A.2d 430, 431 (1973). Although not specifically mentioned by the *Phelps* court, allowing an agent to impose whatever conditions he deems appropriate would also make rule 775(b) of the Maryland Rules of Procedure superfluous since rule 775(b) requires a hearing whenever the court wishes to make the conditions more strict. To allow the agent such unrestricted discretion would amount to granting him more authority than the court itself.

In addition, dicta in a recent court of special appeals' decision indicates that Maryland courts may place even greater restrictions on agent discretion in the future. See *Mason v. State*, 46 Md. App. 1, 8 n.2, 415 A.2d 315, 319 n.1 (1980) (citing *Cox v. State*, 445 S.W.2d 200, 201 (Tex. Crim. App. 1969), wherein the court held that probation agents have no discretion to impose new conditions).

82. Survey, *supra* note 63.

83. *Id.*; see 1979 ANNUAL REPORT, *supra* note 3, at 22 (stating that the rates of unemployment for probationers average 20% for all counties and 30% for Baltimore City). The probationer may be restricted from working in certain areas of employment. For example, a person convicted of sexually molesting a child could never be allowed to drive a school bus. Some situations are less clear. For example, a person convicted of larceny or embezzlement would not be an appropriate candidate to be given access to a cash register. However, if the employer is aware of the defendant's criminal record and is still willing to employ the probationer, there is no reason why the probationer should not be allowed to continue in that position. Frequently, however, a client fails to tell his employer about his record. Generally, the agent will give the probationer a few days to inform his employer

### 3. Rule #3 — Permission Requirements

Rule 3 requires that the probationer get permission from his agent before (a) changing his job or home address, (b) leaving the state of Maryland, or (c) owning or possessing any firearm or dangerous weapon.

#### *a. Changing Home Address or Job*

Technically, rule 3 requires the agent's permission before the probationer may change his home or employment status. Nevertheless, failure to obtain such permission will rarely cause the agent to request a revocation hearing, so long as the probationer seasonably notifies the agent of these changes.<sup>84</sup>

#### *b. Leaving the State*

Unlike the requirement dealing with changes in home and employment, out of state travel is only permitted with the expressed written consent of the supervising agent.<sup>85</sup> The probationer may be granted permission by his agent to leave the state for a maximum period of thirty days.<sup>86</sup> Any travels of greater duration require special approval by the original sentencing judge.<sup>87</sup>

If the probationer wants to establish a domicile in another state, he must, according to the Interstate Compact Agreement, be accepted by the probation department in that other state.<sup>88</sup> The probation department in the state where he wishes to make his new residence can refuse to accept supervision of his case if the applicant does not have suitable residence and employment awaiting him there.<sup>89</sup> If supervision is accepted, the probationer must abide by that state's probationary rules

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about his criminal record. After that time, the agent will contact the employer to verify that the employer is aware of the probationer's record. Survey, *supra* note 63. Persons seeking a career in the armed services are automatically prohibited from enlisting as long as they are on probation. See, e.g., U.S. Army Recruitment Regulation 601-210 (available for viewing at most Army recruiting centers).

84. Survey, *supra* note 63. Such notification should come within a reasonably short period of time after the change in status has occurred. The following states require that such notification be given within 72 hours: Delaware, Iowa, Hawaii, and Wisconsin. See Standard Probation Contracts for Delaware, Iowa, and Hawaii, Compilation of Contracts, *supra* note 52.

85. See PROGRAM GUIDE, *supra* note 1, at 84. Travel into a state bordering Maryland is generally permitted without written permission so long as the probationer returns to Maryland the same day. Interview with Supervision Agents, *supra* note 14.

86. PROGRAM GUIDE, *supra* note 1, at 84. The actual maximum period allowed is only fifteen days. However, because the slip granting such permission may be renewed on a one-time basis, the practical effect is to create a thirty-day limit. *Id.*

87. Interview with Supervision Agents, *supra* note 14.

88. *Id.* For an in-depth analysis of the Interstate Compact Agreement, see Brendis, *Interstate Supervision of Parole and Probation*, 14 CRIME & DELINQUENCY 253 (1968) [hereinafter cited as Brendis].

89. Brendis, *supra* note 88, at 255.



and regulations.<sup>90</sup> Furthermore, in the event the probationer performs poorly in that state, Maryland authorities can force the probationer to return to Maryland, without the usual extradition formalities.<sup>91</sup>

*c. Owning or Possessing Firearms or Other Dangerous Weapons*

Even though this condition appears to allow the agent the discretion to grant any probationer permission to own or possess a firearm, the agent can only exercise this authority for a probationer convicted of a misdemeanor for which a maximum sentence of two years or less may be imposed. The agent's power is limited because federal law precludes all felons or persons convicted of misdemeanors for which a sentence of more than two years may be imposed from receiving, possessing, or transporting a firearm of any type.<sup>92</sup> Furthermore, even

90. *Id.* at 254.

91. Prior to the case being transferred, the probationer must sign a form that waives his right to contest extradition (Form ISC-2). See PROGRAM GUIDE, *supra* note 1, at 85. Nevertheless, in most instances, formal extradition procedures are followed regardless of the existence of such a waiver.

92. Under Title VII of the Gun Control Act of 1968,

Any person who has been convicted by a court of the United States or of a State or any political subdivision thereof a felony . . . and who receives, possesses, or transports in commerce or affecting commerce, . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

18 U.S.C. app. § 1202(a) (1976). Under this section, commerce is defined as "travel, trade, traffic, commerce, transportation, or communication among several states." *Id.* § 1202(c)(1). A felony is defined as "any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less." *Id.* § 1202(c)(2).

Since the inception of Title VII, there has been considerable controversy over the scope of its coverage. Of particular concern to persons convicted of crimes in Maryland has been the definition of a "felony." Because Maryland is primarily a common law jurisdiction, an unjust result could occur if the definition is applied strictly. For example, the common law crime of simple assault has no maximum sentence. Consequently, a person involved in relatively minor criminal conduct could be prohibited from ever receiving, possessing, or transporting a firearm. The United States Court of Appeals for the Fourth Circuit addressed this problem in *United States v. Schultheis*, 486 F.2d 1331 (4th Cir. 1973). The court concluded that in such cases the "actual sentence imposed," and not the maximum allowable sentence, should govern whether a conviction is considered a felony for purposes of section 1202(c)(2). *Id.* at 1335.

Even if an individual is determined to be a felon under section 1202(c)(2), the necessary interstate commerce nexus must also be satisfied before Title VII is applicable. Considerable controversy has centered around whether the interstate commerce provision of the statute applies only to transportation of firearms or to receipt and possession of firearms as well. Subsection (a)(1) of section 1202 is ambiguous and required judicial interpretation. In *United States v. Bass*, 404 U.S. 336 (1971), the Supreme Court concluded that the interstate commerce connection was applicable to all three acts: receipt, possession, and transportation. *Id.* at 347. Such a narrow interpretation seemed, at least initially, to have weakened the statute. Nevertheless, in *Scarborough v. United States*, 431 U.S. 563 (1977), the Court ruled that the connection to interstate commerce need not be

if an agent is in a position to grant a probationer permission to possess a dangerous weapon, he is usually reluctant to do so.<sup>93</sup>

#### 4. Rule #4 — Obey All Laws

Although a strict reading of this condition implies that even a minor traffic violation could place an individual's probation in jeopardy, such offenses are not considered violations of rule 4.<sup>94</sup> Only traffic offenses such as hit and run, driving while intoxicated, and driving with a revoked license are serious enough to warrant a revocation hearing.<sup>95</sup> The court may even find that certain misdemeanor offenses, such as violation of local ordinances, are not breaches of rule 4, since the probationer is only expected to conduct himself as an "average law-abiding citizen would."<sup>96</sup> Serious offenses, on the other hand, will constitute a violation and will, in most instances, result in revocation of the probationary status.<sup>97</sup>

It should be noted, however, that because a revocation hearing is conducted without all the evidentiary safeguards existing in a criminal trial, and because the burden of persuasion necessary to demonstrate a violation of probation is also less than that required at a criminal trial, it is possible for a person to be found not guilty of a crime and still have

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contemporaneous with receipt, possession, or transportation of a firearm so long as the firearm has, at any prior time, been involved in interstate commerce. *Id.* at 575. Consequently, it is unlikely that any firearm will not have the necessary interstate commerce nexus.

Furthermore, even if a felon were able to obtain a gun that had been manufactured in Maryland and had never been taken out of the state, he still may have problems obtaining ammunition for that weapon. Under Title I of the Gun Control Act of 1968, any person convicted of a crime punishable by one year or more cannot receive any firearm or ammunition that has been involved in interstate commerce. 18 U.S.C. § 922(g), (h) (1976). This provision is not, however, applicable to ammunition or firearms that are in the possession of the individual at the time of his conviction. *See Barrett v. United States*, 432 U.S. 212, 216 (1975).

The disability imposed by both Title I and Title VII is for life. In some instances, however, relief from this disability may be obtained by receiving a presidential pardon or the expressed authorization of the governor of a state. 18 U.S.C. app. § 1203(2) (1976). Relief can also be obtained by applying directly to the Bureau of Alcohol, Tobacco and Firearms. 18 U.S.C. § 925(c) (1976). However, relief under section 925(c) requires that the applicant submit to a very extensive and lengthy investigation and, in most instances, the request for relief is denied. Telephone conversation with Jack B. Patterson, Assist. Chief Counsel (Feb. 6, 1981). Furthermore, anyone convicted of a crime involving a firearm or any other weapon is automatically excluded from relief under this section. 18 U.S.C. § 925(c) (1976).

93. Survey, *supra* note 63. Agents are fearful of being sued by persons who may subsequently be harmed by the probationer. *Id.*

94. *Id.*; see *Swan v. State*, 200 Md. 420, 427, 90 A.2d 690, 693 (1952).

95. Survey, *supra* note 63.

96. *Swan v. State*, 200 Md. 420, 427, 90 A.2d 690, 693 (1952).

97. Survey, *supra* note 63. The fact that the probationer has appealed the new conviction does not stay the probation revocation proceeding. *Hutchinson v. State*, 44 Md. App. 182, 184-87, 407 A.2d 359, 361-62, *aff'd*, 292 Md. 367, 438 A.2d 1335 (1982).

his probation revoked as a result of his involvement in that offense.<sup>98</sup>

#### 5. Rule #5 — Notify Probation Agent at Once if Arrested

The failure to report a new arrest is viewed by many agents as a serious violation,<sup>99</sup> and agents often request revocation hearings based on this rule infraction, even in the absence of a subsequent conviction, in an apparent effort to deter probationers from concealing their new arrests.<sup>100</sup>

#### 6. Rule #6 — Permit Probation Agent to Visit Home

Although rule 6 serves as a limited waiver of fourth amendment protection against warrantless intrusion into the probationer's home,<sup>101</sup> the rule stops far short of authorizing searches and seizures of a probationer's premises.<sup>102</sup> To accomplish that goal, a more specific waiver would have to be incorporated into the probation contract<sup>103</sup> and, even then, it is doubtful that such a condition would be enforceable in Maryland. Although probation conditions that serve as a waiver of the right against illegal searches and seizures have withstood constitutional attack in other jurisdictions,<sup>104</sup> the Attorney General of Maryland has

98. *Scott v. State*, 238 Md. 265, 275-76, 208 A.2d 575, 580 (1965). Nevertheless, it is the general practice of agents to wait until a conviction has been obtained before requesting a revocation hearing. Survey, *supra* note 63. Furthermore, some judges are reluctant to issue a warrant for violation of probation if the only basis for a revocation hearing is a new arrest and no adjudication has been reached in that case. *Id.* In fact, some judges do not consider a PBJ disposition as sufficient proof of a rule 4 violation, since technically there is no conviction. *Id.* In light of the *Scott* decision, however, a PBJ should be sufficient to prove that a rule 4 infraction has occurred.

99. Survey, *supra* note 63. States such as Wisconsin require that such notice be given within 72 hours. See *Compilation of Contracts*, *supra* note 52.

100. This is true even though record checks are conducted once every six months on medium and minimum cases and once every three months on maximum supervision cases, PROGRAM GUIDE, *supra* note 1, at 28, and since some jurisdictions, e.g., Washington, D.C., are slow in compiling arrest statistics. Interview with Supervision Agents, *supra* note 14.

101. Most authorities agree that the warrant requirement is inapplicable to mere visits to the probationer's home and worksite. See, e.g., *United States v. Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978); *Croteau v. State*, 334 So. 2d 577, 590 (Fla. 1976); cf. *Wyman v. James*, 400 U.S. 309, 317-18 (1971) (caseworker's visit to home of welfare recipient is not a search).

102. See *Croteau v. State*, 334 So. 2d 577, 580 (Fla. 1976).

103. The following jurisdictions have a provision in their contracts that entitles the probation agent to conduct warrantless searches and seizures of the probationer's home, auto, or person: Arizona, California, Montana, Nebraska, North Carolina, and South Dakota. *Compilation of Contracts*, *supra* note 52.

104. *People v. Mason*, 488 P.2d 630, 97 Cal. Rptr. 302 (Sup. Ct. 1971), cert. denied, 405 U.S. 1061 (1972); *State v. Schlosser*, 202 N.W.2d 136 (N.D. 1972).

Warrantless searches have been permitted where there has been no waiver involved. Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U. L. REV. 800, 813 (1976). The right to search cannot be used for harassment purposes. There must be some reasonable belief that a violation of

stated that Maryland probation agents are precluded from ever conducting searches and seizures, regardless of whether a waiver of fourth amendment protection was made a condition of probation.<sup>105</sup> The Attorney General has further said that all searches and seizures must meet the warrant requirement<sup>106</sup> and that a warrant may only be issued to a "duly constituted policeman, or police officer."<sup>107</sup> Because the Maryland probation agent lacks the requisite "peace officer status," he would be unable to obtain such a warrant.<sup>108</sup> Therefore, anything seized by a probation agent would be an illegal seizure and inadmissible at a criminal trial.<sup>109</sup>

#### 7. Rule #7 — Appear in Court When Notified To Do So

Rule 7 applies to all hearings involving the probationer, whether the hearing relates to the probation case or a collateral matter. Rule 7 is rarely used as the basis for revoking probation, however, unless it is accompanied by other rule infractions.<sup>110</sup>

#### 8. Rule #8 — The Probationer Shall Not Illegally Possess, Use or Sell any Narcotic Drug, Controlled Dangerous Substance, or Related Paraphernalia

Rule 8 overlaps with the rule 4 requirement that the probationer "obey all laws," since unlawful possession of a controlled dangerous

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probation has occurred or is occurring, and the search must be carefully limited to the purpose of probation. *See* 63 Op. Md. Att'y Gen. 502, 507 (1978) (citing *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975); *United States v. Smith*, 395 F. Supp. 1155 (W.D.N.Y. 1975)). When the probation officer is acting as the agent of the police for the purpose of furthering a criminal investigation, such a search is clearly not within the realm of supervision and, therefore, the warrant requirement must be satisfied. *People v. Coffman*, 2 Cal. App. 3d 681, 688, 82 Cal. Rptr. 782, 786 (Ct. App. 1969).

For an historical account of the fourth amendment protection in the probation setting, see Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U. L. REV. 800, 801-05 (1976).

105. 63 Op. Md. Att'y Gen. 502, 505-07 (1978).

106. *Id.*

107. *Id.*

108. MD. ANN. CODE art. 27, § 551 (Supp. 1980). Pursuant to this section, an agent lacks the requisite peace officer status for acquiring a warrant. However, his association with the state makes his status sufficiently "governmental" so as to preclude him from arguing that the warrant requirement is inapplicable to him because he is a private citizen. Furthermore, the Maryland probation agent's status would seem to preclude him from making use of the exceptions to the warrant requirement which true peace officers are permitted (*e.g.*, exigent circumstances, hot pursuit, search incident). Federal probation agents may avail themselves of these exceptions, because they have the requisite peace officer status. 18 U.S.C. § 3653 (1976); *see* *United States v. Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978).

109. 63 Op. Md. Att'y Gen. 502, 505-07 (1978). Whether that same evidence would also be excluded from a revocation hearing is a different question and is addressed in this comment. See text accompanying notes 184-97 *infra*.

110. Survey, *supra* note 63.

substance would amount to a violation of both conditions. Rule 8, however, goes further and prohibits the use as well as the possession of illicit drugs.<sup>111</sup> Such use is detected through "urinalysis," a process whereby an individual's urine is toxicologically tested to detect the presence of various drugs.<sup>112</sup> A probationer required by his probation to submit to urinalysis can expect to be tested at least three times a week, since the ability to detect illicit drug use is directly related to the frequency with which such tests are performed.<sup>113</sup> Testing less frequently affects the sensitivity of the test and thereby increases the possibility that a drug abuser may escape detection.<sup>114</sup>

The accuracy of the tests, on the other hand, is not affected by the frequency of the testing,<sup>115</sup> rather, it is a function of the quality controls

111. Although possession of illicit drugs is a crime, its mere use is not. *See Venner v. State*, 30 Md. App. 599, 605-09, 354 A.2d 483, 488-89 (1976); MD. ANN. CODE art. 43B, § 10(b) (1976).

112. *See Bigger, Urinalysis: Issues and Applications*, FED. PROBATION, Dec. 1979, at 23 [hereinafter cited as *Bigger*]. While a complete discussion of the urinalysis process is beyond the scope of this comment, a few important generalities should be noted. First, tests are not necessarily conducted for all types of illicit drugs. Marijuana, for instance, is not at present tested by any of the facilities used by the Division of Parole and Probation, due to the excessively high cost of performing the necessary tests for its detection. Many probationers are aware of this and thus take advantage of the situation. *See Interview with Two Agents Who Specialized in Drug Offender Cases*, in Columbia, Md. (Sept. 22, 1980) [hereinafter cited as *Interview on Drugs*] (copy available in Law Review Office, University of Baltimore School of Law). Nevertheless, because some sellers of marijuana may treat a low quality grade of marijuana with other substances, such as penicylidine (PCP), and sell it as a higher grade marijuana, the unsuspecting purchaser may consequently test positive (called a "dirty urine") for the additive (PCP) and thus be in violation of rule 8. *Id.*

There is no means of masking one drug by taking another substance. Therefore, the often held belief that goldenseal tea will render illicit drug use undetectable is unfounded. *Bigger, supra* note 112, at 32.

An additional point to note is that a negative result (indication of no illicit drug use) may be due to the fact that a particular specimen was not tested. Because of the high expense of urinalysis (approximately \$3 per specimen), some programs may only test random specimens. 1980 ANNUAL REPORT, *supra* note 3, at 32. In addition, the cost factor may cause a urinalysis collection center to "shop around" for the least expensive lab. This may result in frequent changes in the labs used and may have an effect on the ability to detect a certain substance, since different labs use different methods of testing, and one method may be more likely than another to detect one type of substance. *Id.* The probationer, of course, is unaware of when such changes take place and thus may have a positive urine test even after having escaped detection for a considerable period of time. *Id.* Use of urinalysis is not constitutionally objectionable on either fourth or fifth amendment grounds. *See Bigger, supra* note 112, at 23.

113. *Bigger, supra* note 112, at 30. Certain types of drugs metabolize faster than others. For example, stimulants such as amphetamines and cocaine will metabolize completely within 24 to 48 hours. Consequently, if a probationer submitted a specimen only once every three days, he could escape detection. *Id.*

114. *Id.*

115. Accuracy concerns the likelihood of obtaining an erroneous result, such as detecting the presence of a substance where there is none or detecting a substance

used in collecting and testing urine specimens.<sup>116</sup> Because of the tight restrictions placed on clinical laboratories performing such tests, the possibility of the probationer's submitting a specimen that tests positively for an illicit substance, when the probationer is actually innocent of taking such a substance, is almost nonexistent.<sup>117</sup> The results of urinalysis are so accurate that they are viewed at revocation hearings as a reliable indicator of illicit drug use.<sup>118</sup> Furthermore, because the rules of evidence are adhered to less strictly at a revocation hearing than at a criminal trial,<sup>119</sup> in most instances the agent need only present copies of a laboratory report to prove a rule 8 infraction.<sup>120</sup>

9. Rule #9 — The Probationer Shall Pay, Through the Division of Parole and Probation, such Court Costs, Fines, Attorney's Fees, and Restitution as Determined by the Court

A person may be ordered to pay fines, court costs, and restitution whenever he is found guilty of a crime.<sup>121</sup> Until recently this meant

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different from that which is actually present. These are known as "false positives." *Id.* at 31.

116. Quality controls are operating procedures used to assure the accuracy of the results. Most quality control problems involve the misreading of a chemical substance that is not a drug or the accidental mislabeling of one person's urine as another person's. Extensive quality control devices have been developed to avoid both of these problems. *See id.* at 31 and references cited therein.
117. *Id.* at 31, 33; Interview on Drugs, *supra* note 112; Telephone conversation with a Representative of the State of Maryland Drug Abuse Administration (Nov. 13, 1980) (copy available in Law Review Office, University of Baltimore School of Law).
118. *See* Survey, *supra* note 63; Interview with The Honorable Stanley Klavan, Administrative Judge for Montgomery County District Court, in Rockville, Md. (Nov. 12, 1980) [hereinafter cited as Interview with Judge Klavan].
- If the probationer is on prescribed medication such as codeine, dilauda, demoral, or percodin, and the form of urinalysis testing used is thin-layer chromatography, there is a substantial possibility of misleading results. Under such circumstances, the results may indicate that any one of the following substances was present in the probationer's system: morphine, methadone, propoxyphene, or even phenylclidine (PCP). Bigger, *supra* note 112, at 27. This is due to the fact that all of these substances give a similar reading when thin-layer chromatography is used. *Id.* Only by utilizing an additional test, such as gas chromatography, can the various substances be distinguished. *Id.* Therefore, whenever a probationer is already on prescribed medication and denies illicit drug use, his attorney should demand that further substantiation be presented at the revocation hearing, since the mere hearsay presentation of a laboratory result may be inadequate to show that a rule 8 infraction has occurred.
119. *E.g.*, Knight v. State, 7 Md. App. 313, 321, 255 A.2d 441, 444 (1969) (use of hearsay testimony is admissible at a probation revocation hearing); *see* notes 184-97 and accompanying text *infra*.
120. Survey, *supra* note 63. Consequently, the "chain of custody" of the urine specimen need not be established and the technician performing the test need not be present at the hearing unless the circumstances indicate that the results may be invalid. *See* Interview with Judge Klavan, *supra* note 118.
121. MD. ANN. CODE art. 27, § 640(b) (Supp. 1981). *See also id.* § 7(g). It is important to note that although the 1981 amendment to art. 27, § 640 implies that restitution to third parties is permissible, the recent holding in Montgomery v. State, 292 Md.

that a person could not be ordered to pay a fine if he received Probation Before Judgment (PBJ), because a PBJ was not technically a conviction.<sup>122</sup> The 1981 General Assembly changed this situation with the enactment of House Bill 109, which made the imposition of a fine appropriate even for a PBJ disposition.<sup>123</sup>

Where the fine or restitution imposed is so substantial that a defendant is incapable of paying it all at once, he may be allowed to make periodic payments over the duration of the probationary period.<sup>124</sup> Such an arrangement, however, is subject to a two percent collection fee.<sup>125</sup> Furthermore, an account is considered sufficiently delinquent to warrant a violation of probation hearing when either four consecutive weekly payments or two consecutive monthly payments have been missed.<sup>126</sup> Delays are allowed for extenuating circumstances; however, the agent is still required to notify the court of a delinquent status,<sup>127</sup> even if a request for a revocation hearing does not accompany the notification.<sup>128</sup>

In some situations, the restitution ordered may be so excessive that payment may be beyond the financial means of the probationer. Although this issue has not been addressed by Maryland's appellate courts, in light of how other jurisdictions have addressed the prob-

155, 438 A.2d 490 (1981), explicitly excludes the insurers of victims from receiving restitution in the form of reimbursement for money paid to their insureds. *Id.* at 163, 438 A.2d at 493.

122. *Commissioner of Motor Vehicle Administration v. Lee*, 254 Md. 279, 287, 255 A.2d 44, 48, (1969). It has always been permissible to impose restitution under a PBJ because restitution is in the nature of reparation or redress designed to make the accused's victim whole. *Id.* Even so a defendant is only required to make restitution for losses arising from the specific crimes actually prosecuted. *Mason v. State*, 46 Md. App. 1, 6-9, 415 A.2d 315, 318-19 (1980); *see* MD. ANN. CODE art. 27, § 640(b) (Supp. 1981).
123. Law of May 12, 1981, ch. 346, § 1, 1981 Md. Laws 1705-06 (codified at MD. ANN. CODE art. 27, § 641(a)(1)(I) (Supp. 1981)).
124. *See* MD. ANN. CODE art. 27, § 640(d)(4) (Supp. 1981). Furthermore, the period of probation supervision may be extended beyond the statutory limits for the purpose of paying restitution, provided that the defendant agrees to such an extension. *Id.* § 641A.
125. *Id.* § 640(d)(4).
126. Letter from Chief Judge Robert C. Murphy of the Court of Appeals of Maryland to the Courts of Maryland, Guidelines for Payment of Fines, Costs, Restitution, and Attorney Fees (June 17, 1976) [hereinafter cited as Restitution Guidelines] (copy available in Law Review Office, University of Baltimore School of Law).
127. *Id.*
128. *Id.* It should be noted that an order for restitution does not preclude a civil action. However, any civil judgment will be reduced by the amount paid through the Division of Parole and Probation. MD. ANN. CODE art. 27, § 640(f) (Supp. 1981). Once a person's probation is revoked, he no longer has an obligation to pay the court-ordered restitution, since that was a condition of probation. Once probation has been revoked, the conditions are no longer in effect. At this point, the injured party would have to seek civil action if he wished to collect any money still owed him. It should also be noted that victims of crimes may be able to obtain compensation through the Victims Compensation Board. *Id.* art. 26A, § 3 (1981).

lem,<sup>129</sup> it is likely that such a requirement in Maryland would be ruled invalid.<sup>130</sup>

### B. *Special Conditions*

Under article 27, section 641A of the Maryland Code, a judge may impose upon the probationer whatever additional conditions he deems appropriate.<sup>131</sup> Few conditions are rarely if ever ruled invalid,<sup>132</sup> and those that are potentially invalid often go unchallenged.<sup>133</sup>

In Maryland, drug or alcohol counseling are the most frequently imposed special conditions.<sup>134</sup> Whether such counseling may be terminated prior to completion of the probationary period is a determination that is frequently left to the discretion of the supervising agent.<sup>135</sup> In some situations, however, such discretion is not granted to the agent.<sup>136</sup> Consequently, the agent must petition the court for a modification of the terms of probation if he wishes to have the special condition removed; otherwise, the probationer must continue to abide by the condition until the term of probation has expired. Furthermore, although the court may reduce the number of special conditions without holding a hearing, any attempt by the court to make the requirements more stringent must be accompanied by a hearing.<sup>137</sup>

Regardless of what special conditions the court chooses to impose, the condition must be comprehensible to the agent as well as the probationer<sup>138</sup> and, most importantly, there must be a rational basis for its imposition.<sup>139</sup> Even though these are the guidelines applied in Mary-

129. Annot., 73 A.L.R.3d 1240 (1976).

130. Restitution that is beyond an individual's capabilities of paying may be held as unreasonable and thus invalid. *See* Restitution Guidelines, *supra* note 126. *Cf.* *Watson v. State*, 17 Md. App. 263, 274, 301 A.2d 26, 31 (1973) (a condition must be reasonable).

131. MD. ANN. CODE art. 27, § 641A (1976).

132. Survey, *supra* note 63.

133. *Id.*

134. *See id.*

135. For example, "attend such counseling as Probation Agent directs," represents language indicating that the agent has discretion in determining when the condition has been satisfied.

136. *See* PROGRAM GUIDE, *supra* note 1, at 18-19. When the court chooses not to give the agent discretion in determining when a condition has been satisfied, the agent must continue in his efforts to have the condition complied with. His failure to carry out such a ministerial task may subject him to tort liability if a third person is harmed by the probationer as a result of the agent's failure to perform that task. *See, e.g., Semler v. Psychiatric Inst.*, 538 F.2d 121 (4th Cir. 1975), *cert. denied*, 429 U.S. 827 (1976). *See generally* Kutcher, *The Legal Responsibility of Probation Officers in Supervision*, FED. PROBATION, Mar. 1977, at 35-38.

137. MD. R.P. 775(b). *Compare id.* with rule 1 of the Standard Probation Contract. Rule 1 appears to allow an agent the authority to increase the number of conditions without a hearing. *See* notes 72-81 and accompanying text *supra*.

138. *Watson v. State*, 17 Md. App. 263, 274, 301 A.2d 26, 31 (1973). *See generally* Jaffe, *supra* note 53.

139. *Watson v. State*, 17 Md. App. 263, 274, 301 A.2d 26, 31 (1973).



land and in most other jurisdictions,<sup>140</sup> it is often difficult to determine if a given condition meets these standards. Maryland courts have rarely addressed the validity of probation conditions; consequently, it may be helpful to review the validity of certain conditions in other jurisdictions to determine if a given condition would be acceptable in Maryland. Forced attendance or non-attendance at religious services,<sup>141</sup> sterilization, and any conditions dealing with sexual privacy have been uniformly deemed unenforceable.<sup>142</sup> Other conditions, such as banishment, are not universally invalid but are nevertheless viewed as unreasonable in the majority of jurisdictions.<sup>143</sup> However, because of the unique set of characteristics possessed by each offender, most special conditions must be examined on a case-by-case basis before any determination as to their reasonableness can be made.<sup>144</sup> Consequently, even violations of the first,<sup>145</sup> fourth,<sup>146</sup> and fifth<sup>147</sup> amendments may be permitted if a truly rational basis for their imposition exists. The rational basis test has even been used to justify the imposition of restrictions on the manner in which a person dresses.<sup>148</sup> For example, in a 1976 California case, *People v. McDowell*,<sup>149</sup> a condition requiring a recidivist purse snatcher to "wear leather shoes with metal taps on the heels and toes anytime he [left] the house" was upheld.<sup>150</sup>

The reasoning behind the rational basis test is, as noted by the Court of Appeals of California, to foster rehabilitation and promote public safety.<sup>151</sup> In recent years, however, there has been some controversy over whether requiring probationers to perform community service furthers these objectives. Although the courts have recognized that

140. *See id.*

141. *See* Imlay, *See What Condition Your Conditions Are In*, FED. PROBATION, June 1971, at 8 [hereinafter cited as Imlay].

142. *See* Annot., 94 A.L.R.3d 1218 (1979).

143. *See* authority cited in *Bird v. State*, 231 Md. 432, 437-38, 190 A.2d 804, 807 (1965); Jaffe, *supra* note 53, at 26. *But see* the Standard Oklahoma Probation Contract, Compilation of Contracts, *supra* note 52.

144. *See* Imlay, *supra* note 141, at 4. *See generally* Annot., 94 A.L.R.3d 1218, 1220 (1979).

145. Jaffe, *supra* note 53, at 29-32.

146. *Id.* at 32-33.

147. *Id.* at 36. *But see* *Health v. State*, 310 So. 2d 38 (Fla. Dist. Ct. App. 1975).

148. *People v. McDowell*, 59 Cal. App. 3d 807, 813, 130 Cal. Rptr. 839, 843 (1976).

149. 59 Cal. App. 3d 807, 130 Cal. Rptr. 839 (1976).

150. The *McDowell* court gave the following explanation for upholding the validity of this condition:

The concept of the condition imposed by the courts bears a direct relationship to appellant's budding career as a purse snatcher. During the course of the crime of which appellant was convicted in the instant case, he was wearing tennis shoes. This type of footwear helped him to approach his victim silently and facilitated his two successful efforts to outrun the pursuing officers who were trying to apprehend him . . . . Compliance with that term of probation would foster rehabilitation and promote public safety.

*Id.* at 813, 130 Cal. Rptr. at 843.

151. *Id.*

community service is not necessarily therapeutic, they have, nonetheless, viewed it as a "symbolic form of restitution to the community."<sup>152</sup> Regardless of the rationale, the imposition of community service as a condition of probation in Maryland now has legislative<sup>153</sup> as well as judicial support.

#### IV. THE REVOCATION HEARING

Of the three phases of probation, it is the revocation hearing that presents the greatest threat to individual liberty. Recognizing this fact, the Supreme Court, in the landmark cases of *Morrissey v. Brewer*<sup>154</sup> and *Gagnon v. Scarpelli*,<sup>155</sup> set forth the following due process guarantees that must be afforded all probationers at a revocation hearing:

- (1) Preliminary hearing.
- (2) Written notice of the conditions alleged to have been violated.
- (3) Prompt revocation hearing.
- (4) Disclosure of evidence against the accused and the right to cross examine adverse witnesses unless deemed inappropriate for good cause by the hearing officer.
- (5) Right to be heard in person.
- (6) Right to counsel under certain circumstances.
- (7) Neutral and detached hearing officer.
- (8) A two-step adjudication process whereby it must first be determined that the accused violated a condition of probation and, if so, whether such violation warrants his probation being revoked. Furthermore, the probation violator must be afforded the opportunity to present evidence in mitigation before the final determination is made as to whether probation should be revoked.
- (9) If revocation is ordered, a written statement by the fact finder stating the evidence relied upon in reaching that decision must be given to the probation violator.<sup>156</sup>

152. *United States v. Arthur*, 602 F.2d 660, 664 (4th Cir. 1979).

153. MD. ANN. CODE art. 27, § 726A (Supp. 1981).

154. 408 U.S. 471 (1972).

155. 411 U.S. 778 (1973). The roots of the *Morrissey* and *Gagnon* decisions can be traced to *In re Gault*, 387 U.S. 1 (1967). In *Gault*, the Supreme Court declared that juveniles, like adults, cannot be deprived of the right to notice of the charges against them, the right to counsel, the right to confrontation, and the privilege against self-incrimination without due process of law. *Id.* at 12-57. Neither juvenile proceedings nor adult revocation hearings are technically criminal prosecutions. Nevertheless, since both are situations in which an individual may be deprived of his liberty, it is not surprising that the rights afforded juveniles were later afforded parolees and probationers.

156. *Morrissey v. Brewer*, 408 U.S. 471, 485, 487-89 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). Despite these guarantees, the probationer may still waive his right to a revocation hearing. *See State v. Baylis*, 27 Ariz. App. 222, 553 P.2d 675 (1976); *People v. Vickeras*, 8 Cal. 3d 451, 105 Cal. Rptr. 305, 503 P.2d 1313 (1972). The individual must, however, be informed of the right to a hearing before the right can be waived. *People v. Darrell*, 72 Mich. App. 710, 250 N.W.2d 751 (1976).

### A. Preliminary Hearing

Even though *Morrissey* provides that a preliminary hearing will be held for all accused parole violators,<sup>157</sup> and *Scarpelli* requires that a similar procedure be followed for probationers,<sup>158</sup> the Maryland probationer is not afforded such a hearing.<sup>159</sup> The Court of Special Appeals of Maryland, in *McRoy v. State*,<sup>160</sup> reasoned that the Supreme Court never intended to preclude state courts from substituting an adequate alternative to the preliminary hearing requirement.<sup>161</sup> The *McRoy* court held that the true rationale for requiring a preliminary hearing is to ensure that the revocation process complies with procedural due process.<sup>162</sup> Since a revocation hearing may be conducted administratively, a preliminary hearing was deemed necessary to assure that probable cause existed for detaining the accused violator.<sup>163</sup> Because, under Maryland law, only a judge may issue a warrant for violation of probation, the judge's issuance of a warrant based on probable cause is, according to *McRoy*, a satisfactory substitute for a preliminary hearing.<sup>164</sup> Maryland's approach is followed by the Michigan courts, which view the procedure as not only a satisfactory alternative but one that actually affords far greater due process protection.<sup>165</sup>

### B. Written Notice of the Conditions Violated

The *McRoy* court also addressed the second due process requirement outlined in *Morrissey* and *Scarpelli*: the requirement for written notice.<sup>166</sup> The court of special appeals held that as long as "the probationer is seasonably informed of the substance of the charge against him," such action would constitute "notice."<sup>167</sup> The court stated that the usual practice of serving the accused violator with a copy of the warrant outlining the alleged rule infractions<sup>168</sup> would fulfill the written notice requirement.<sup>169</sup>

157. 408 U.S. 471, 485 (1972).

158. 411 U.S. 778, 782 (1973).

159. *McRoy v. State*, 24 Md. App. 321, 324 n.1, 330 A.2d 693, 695 n.1 (1975).

160. 24 Md. App. 321, 330 A.2d 693 (1975).

161. *Id.* at 324 n.1, 330 A.2d at 695 n.1.

162. *Id.*

163. *Id.*

164. *Id.*

165. *People v. Jackson*, 63 Mich. App. 241, 245, 234 N.W.2d 467, 470-71 (1975).

166. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

167. 24 Md. App. 321, 329-31, 330 A.2d 693, 698-99 (1975).

168. *See* MD. R.P. 775(c). The allegation need not be as specific as that required in the indictment. *See* Annot., 36 L. Ed. 2d 1077, 1108 (1973).

169. 24 Md. App. 321, 330 n.2, 330 A.2d 693, 699 n.2 (1975); *see* MD. R.P. 775(c). Even if the accused violator is given a copy of the charges setting forth the condition(s) that he is alleged to have violated, the "seasonability" of that notice may still be at issue if the probationer has not been afforded sufficient time to prepare a defense to those allegations. *See id.* For example, if a probation agent learns of additional rule infractions after the warrant for violation of probation has been served

### C. Prompt Hearing

Although the Supreme Court has stated that an accused probation violator is entitled to a prompt revocation hearing,<sup>170</sup> a probationer in most jurisdictions, including Maryland, who is seeking the dismissal of a petition to revoke probation on the grounds of a denial of his rights to a prompt hearing is likely to encounter numerous problems.

First, there is little case authority to establish what is considered an excessive delay. Despite the fact that the Supreme Court has stated that a revocation hearing must be held within a "reasonably" prompt period of time and that a delay of two months would not be considered excessive,<sup>171</sup> the extent to which the two-month period may be exceeded remains unclear.<sup>172</sup>

Second, no test has been established for measuring the prejudice inuring to the probationer from prehearing delays. Although the Supreme Court, in *Barker v. Wingo*,<sup>173</sup> established a four-prong test for determining when pretrial delays are deemed sufficiently prejudicial as to warrant a dismissal,<sup>174</sup> courts have been reluctant to apply the *Barker* test to revocation hearings.<sup>175</sup>

Finally, there are situations in which the prompt hearing requirement simply does not apply. For example, if a probationer is being held on a new offense in a different jurisdiction and the warrant for

but just prior to the revocation hearing, it is questionable whether the agent could then amend the petition to revoke without violating the notice requirement. Although no reported Maryland cases explicitly address this issue, it seems clear that an addendum to the petition to revoke probation made on the same day of the hearing, alleging an entirely new rule infraction, would violate the notice requirement. *Hodges v. State*, 370 So. 2d 78, 79 (Fla. Dist. Ct. App. 1979) (petition to revoke probation cited child abuse, but the agent attempted to have probation revoked on the charge of assault of a police officer); *cf. People ex rel. Angell v. Lynch*, 71 Misc. 2d 921, 377 N.Y.S.2d 556 (1972) (one day notice not sufficient).

Changing a rule 4 (obey all laws) infraction from "by being arrested for crime X," to read "by being convicted of crime X," would not appear to prejudice the probationer sufficiently to be considered a violation of the notice requirement. *See Barber v. State*, 486 S.W.2d 352, 354 (Tex. Crim. App. 1972).

170. *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

171. *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

172. Nevertheless, one federal court and one state court have found four months to be excessive. *Johnson v. Holley*, 528 F.2d 116 (7th Cir. 1975); *People ex rel. De Pass v. Parole Superintendent*, 86 Misc. 2d 261, 381 N.Y.S.2d 645 (1976).

173. 407 U.S. 514 (1972).

174. The four prongs are as follows: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Id.* at 530-32.

175. *See* 5 AM. J. CRIM. L. 354, 360 (1977). *But see* *United States v. Companion*, 545 F.2d 308, 310-12 (2d Cir. 1976); *Hernandez v. State*, 556 S.W.2d 337, 340 (Tex. Crim. App. 1977). In the recent case of *State v. Berry*, 287 Md. 491, 413 A.2d 557 (1980), the court of appeals intimated that a *Barker*-type analysis might be applied if the issue were squarely presented for consideration. *Id.* at 501, 413 A.2d at 563.

violation of probation is serving merely as a detainer,<sup>176</sup> under the ruling in *Moody v. Daggart*,<sup>177</sup> there is no constitutional requirement that the probationer be returned for revocation proceedings until his commitment in that jurisdiction has been satisfied.<sup>178</sup>

Despite the limitations inherent in seeking a dismissal on the grounds of a denial of a prompt revocation hearing, the Maryland probationer may be in a better position than his counterpart in many other jurisdictions. The Court of Appeals of Maryland, in *State v. Berry*,<sup>179</sup> intimated that a *Barker*-type balancing test may be employed if the appropriate case were presented.<sup>180</sup> Although Maryland has set no

176. A detainer in this context is an internal administrative mechanism to assure that an inmate subject to an unexpired term of confinement will not be released from custody until the jurisdiction asserting a [probation] violation has had an opportunity to act—in this case by taking the inmate into custody or making a [probation] revocation determination.

*Moody v. Daggart*, 429 U.S. 78, 80 n.2 (1976).

177. 429 U.S. 78 (1976).

178. *Id.* at 81, 87. The *Daggart* Court reasoned that the prompt hearing requirement is not triggered until a warrant for violation of probation has been executed and that technically a warrant is not executed so long as it is serving only as a detainer. *Id.* It should be noted that *Daggart* was actually a parole case; even so, in light of the *Scarpelli* decision, the same law should be applicable to probation cases. *Gragnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

The *Daggart* rule, however, merely states that there is no constitutional requirement to provide a prompt revocation hearing in such circumstances. Consequently, a state could enact a statutory scheme to ensure quick disposal of detainees. Several states, including Maryland, have adopted the Interstate Agreement on Detainers Act whereby a prisoner being held in another jurisdiction can demand to be tried within 180 days for any detainer relating to an "untried indictment, information or complaint." MD. ANN. CODE art. 27, § 616D (1976). Although some probationers have attempted to use this provision as a means of disposing of detainees for violation of probation, such efforts have failed. *E.g.*, *State v. Spaulding*, No. 20505 (Mont. Co. Cir. Ct. Md. Nov. 2, 1978). Courts have uniformly held that the Act is inapplicable to probation violation warrants since the Act was designed solely for pretrial matters. *Sable v. Ohio*, 439 F. Supp. 905 (D. Okla. 1977); *Suggs v. Hopper*, 234 Ga. 242, 215 S.E.2d 246 (1975); *Buchman v. Michigan Dep't of Corrections*, 50 Mich. App. 1, 212 N.W.2d 745 (1973); *State v. Pfeiffer*, 11 N.C. App. 183, 180 S.E.2d 469 (1977); see *Haley v. State*, 47 Md. App. 45, 49, 421 A.2d 982, 984 (1980); *State v. Knowles*, 270 S.E.2d 133 (S.C. 1980); *Blackwell v. State*, 546 S.W.2d 828 (Tenn. Ct. App. 1976).

Similarly, the Intra-State Detainer Agreement, (codified in Maryland at MD. ANN. CODE art 27, § 616S (1976)), should also be inapplicable. See *People v. Hallaway*, 39 Mich. App. 74, 197 N.W.2d 335 (1972).

179. 287 Md. 491, 413 A.2d 557 (1980).

180. *Id.* at 501, 413 A.2d at 563. The court of special appeals, in *Berry*, ruled that the hearing to revoke probation had to be held during the period of probation and that failure to conduct the hearing within the probationary period denied the sentencing court the authority to revoke probation. 41 Md. App. 563, 567-68, 398 A.2d 59, 61 (1979), *rev'd*, 287 Md. 491, 413 A.2d 557 (1980). The court of appeals, however, reversed. It held that so long as the hearing is held promptly, it does not matter whether the term of probation has expired. 287 Md. at 498-99, 413 A.2d at 562; accord, *Miller v. State*, No. 20 (Md. Ct. Spec. App. Feb. 6, 1981). Furthermore, the *Berry* court inferred that the initiation of the revocation proceeding (the request for and the subsequent issuance of a warrant for violation of probation) may also take place after the term of probation has expired, so long as the state

minimum period required to "trigger"<sup>181</sup> a *Barker*-type balancing test for revocation hearings, the period of time will probably be relatively short in light of the enactment of Maryland Rule 746,<sup>182</sup> which created even stricter speedy trial requirements than are required under the *Barker* test.<sup>183</sup>

*D. Disclosure of Evidence Against the Accused  
and the Right to Confrontation*

All criminal defendants are afforded the right to confront adverse witnesses.<sup>184</sup> These same rights are afforded an accused probation violator, but they are applied in a far more restricted manner due to the lax rules of evidence employed at a revocation hearing.<sup>185</sup> For example, the hearsay rule is not applicable at a revocation hearing;<sup>186</sup> consequently, the accused may in some instances be denied the opportunity to confront the direct source of evidence that may cause his ultimate imprisonment.

A further restriction on the right to confrontation lies with the applicability of the exclusionary rule. At present, Maryland has not addressed the question of whether evidence obtained in violation of the fourth amendment's protection against illegal searches and seizures<sup>187</sup>

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has acted diligently and with reasonable promptness. 287 Md. at 498-99, 413 A.2d at 562-63. Later, in *Miller*, the court of special appeals firmly established what the *Berry* decision had merely inferred. *Miller v. State*, No. 20, slip op. at 3 (Md. Ct. Spec. App. Feb. 6, 1981). It should also be noted that the rule of law should be the same regardless of whether a summons, rather than a warrant, for violation of probation is issued by the court. See Memo from Assistant Attorney General Allen D. Eason to Maryland Division of Parole and Probation (Feb. 20, 1981).

181. This assumes that in fact a balancing test will be employed for determining whether the prompt hearing requirement has been met. Under *Barker*, there must be a sufficient period of delay before the court will even consider applying a balancing test. 407 U.S. 514, 530 (1972).
182. Within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to rule 723, a trial date must be set. Trial proceedings must be initiated not later than 180 days after the appearance or waiver of counsel or after the first appearance of the defendant before the court. MD. R.P. 746(a).
183. Unlike the *Barker* balancing test, in which delays caused by the state are balanced against those caused by the defendant, under rule 746(a) of the Maryland Rules of Procedure, any delay of more than 180 days will result in a dismissal unless "good cause" is shown or the defendant has consented to a postponement. See *State v. Hicks*, 285 Md. 310, 403 A.2d 356 (1979). For a discussion of *Hicks*, see 9 U. BALT. L. REV. 473 (1980).

Maryland revocation hearings are generally scheduled within four weeks. See Interview with Clerks of the District Courts for Montgomery, Prince George's, and Howard Counties (Feb. 6, 1981) (copy available in Law Review Office, University of Baltimore School of Law).

184. U.S. CONST. amend. VI; MD. CONST., DECL. OF RIGHTS art. 21.
185. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Scott v. State*, 238 Md. 265, 275, 208 A.2d 575, 580 (1965); *Knight v. State*, 7 Md. App. 313, 321, 255 A.2d 441, 444 (1969).
186. *Knight v. State*, 7 Md. App. 313, 321, 255 A.2d 441, 444 (1969).
187. The exclusionary rule prevents the introduction of evidence in a criminal proceeding when the evidence has been obtained in violation of the fourth amendment

should be excluded from revocation hearings. An examination of other jurisdictions indicates that the majority of jurisdictions find the exclusionary rule inapplicable for such purposes.<sup>188</sup> Maryland has also not addressed whether evidence obtained in violation of the requirements

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right of all citizens "to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV; *see* *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). The fourth amendment is only applicable to searches performed by the government and does not apply to searches performed by private citizens. *United States v. McGuire*, 381 F.2d 306, 313 n.5 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968).

188. *See* Annot., 77 A.L.R.3d 636, 640-43 (1977); Annot., 30 A.L.R. FED. 824, 827 (1976). Although many rationales have been advanced, most courts reason that the exclusionary rule was never intended to exclude illegally seized evidence in all proceedings or against all persons. *See* 11 VAL. U.L. REV. 149, 153 (1976). Such evidence is admissible in grand jury proceedings, in sentencing proceedings, and even in the case on the merits, if used for impeachment purposes. Annot., 30 A.L.R. FED. 824, 827 (1976). It has been argued that illegally seized evidence should be admitted at revocation hearings, because such a hearing is not technically a criminal trial, and the Supreme Court has stated that such hearings must be flexible enough to consider a wide variety of evidence. 11 VAL. U.L. REV. 149, 157 (1976).

Some courts have also reasoned that the exclusionary rule should be inapplicable because the objectives of the rule would not be advanced by applying the rule twice: first in the criminal prosecution and again in the revocation hearing. *Id.* at 159. *But see* *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975) (if the police officer conducting the illegal search is aware of the person's probationary status, then the evidence is inadmissible even at a revocation hearing).

However, the most fundamental rationale for the rule's inapplicability should come from applying the balancing test outlined in *United States v. Calandra*, 414 U.S. 338, 348-49 (1974). *See* 1979 B.Y.U.L. REV. 161, 163. The possible benefit to the individual's interest in privacy in applying the exclusionary rule is weighed against the hindrances to the probation process. To date, few courts have fully applied this test. 54 TEX. L. REV. 1115, 1129 (1970). In *Dulin v. State*, 346 N.E.2d 746 (Ind. Ct. App. 1976), the test was applied and the court concluded that application of the exclusionary rule would undermine the objectives of the probationary process and outweigh any benefit achieved from its application. *Id.* at 751. For a commentary supporting this ruling, *see* 11 VAL. U.L. REV. 149 (1976). However, the United States Court of Appeals for the Fourth Circuit reached the opposite conclusion. In *Workman v. United States*, 585 F.2d 1205 (4th Cir. 1978), the court applied the *Calandra* balancing test but found that the nature of the proceeding so closely paralleled that of a criminal trial that the rule should be made applicable in revocation hearings as well. The court reasoned that because a revocation hearing is adjudicatory in nature, and because a loss of freedom might result at this stage, the exclusionary rule should be applied. *Id.* at 1209-11. *See also* *Hewitt v. North Carolina*, 415 F.2d 1316, 1322 (4th Cir. 1969). The *Workman* court pointed out that a survey of all the Supreme Court cases dealing with the applicability of the exclusionary rule demonstrates that the Court has never exempted the application of the exclusionary rule "in any adjudicatory proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim . . . to imprisonment." *Workman v. United States*, 585 F.2d at 1211. For a discussion of *Workman*, *see* 47 GEO. WASH. L. REV. 863, 863-85 (1975).

Because *Calandra* appears to be the most appropriate test for resolving this issue, and because most earlier decisions did not fully utilize this test, the applicability of the exclusionary rule for fourth amendment purposes at probation revocation hearings may change in the future even though the majority of courts at present find the rule inapplicable.

outlined in *Miranda v. Arizona*<sup>189</sup> should be excluded from the revocation process.<sup>190</sup> Again, the majority view is that the exclusionary rule is not applicable at revocation hearings, even when the evidence presented is obtained during a custodial interrogation in which the probationer is not given the necessary *Miranda* warnings.<sup>191</sup>

There is, nonetheless, some indication that the Maryland courts will in the future require stricter adherence to evidentiary safeguards.<sup>192</sup> In 1979, the Court of Special Appeals of Maryland in *Wilson v. State*<sup>193</sup> reversed a revocation order on the grounds that the state had failed to show that the new offense, upon which the petition to revoke was based, had occurred within the probationary period.<sup>194</sup> Although the new offense had actually occurred during the term of probation, the state inadvertently neglected to produce such evidence. The state asked that the appellate court take judicial notice of the new offense,<sup>195</sup> since the charging document clearly indicated that it had occurred within the period of probation.<sup>196</sup> The court of special appeals rigidly refused to take judicial notice of this fact, stating that because it was not on the record, it was simply an unproven allegation; consequently, the court reversed the revocation order.<sup>197</sup> Although Maryland courts have rarely demonstrated such formality in revocation matters, the approach adopted in *Wilson* may indicate a trend toward greater formality.

### E. Opportunity to be Heard in Person

The probationer, like a defendant at a criminal trial, is afforded the right to testify in his own behalf.<sup>198</sup> This right, however, could be

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189. 384 U.S. 436, 478-79 (1966).

190. The exclusionary rule also applies to evidence obtained through illegal questioning. Under *Miranda v. Arizona*, 384 U.S. 436 (1966), any statement stemming from custodial interrogation of the defendant may not be used against him at trial unless it is demonstrated that certain procedural safeguards were afforded. Failure to assure such safeguards is a violation of the fifth amendment privilege against self-incrimination and the limited sixth amendment right to counsel. *Id.* at 478-79.

191. See Annot., 30 A.L.R. FED. 824, 825-36 (1976); Comment, *Probation Officer Interrogation of an In-Custody Probationer: An Analysis of the Applicability of the Miranda Doctrine and the Voluntariness Standard*, 10 U.S.F. L. REV. 441, 443-44 (1976). See also 7 CAP. U.L. REV. 103, 106 (1977). A state court could decide that the exclusionary rule is inapplicable for fourth amendment purposes but applicable for *Miranda* purposes, or vice versa. See 30 A.L.R. FED. 824, 826-27 (1976). Note that three states (Fla., Ill., and Maine) have a general condition in their standard probation contracts, requiring that probationers answer all questions put to them by their probation officers. Compilation of Contracts, *supra* note 52.

192. *E.g.*, *Wilson v. State*, No. 221 (Md. Ct. Spec. App. Oct. 30, 1979).

193. No. 221 (Md. Ct. Spec. App. Oct. 30, 1979).

194. *Id.* slip op. at 2.

195. *Id.* at 2 (citing *James v. State*, 31 Md. App. 666, 684-85, 358 A.2d 595, 601 (1966)).

196. *Id.*

197. *Id.* at 2-3.

198. *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).



detrimental to the probationer if the alleged violation involves a new offense that has not yet been adjudicated, since anything stated by the probationer at the revocation hearing can be used against him at the subsequent trial.<sup>199</sup> The accused probation violator often must take the witness stand to disprove an allegation or to offer proof in mitigation, if he is to have any chance of avoiding revocation.<sup>200</sup> If the probationer chooses to take the stand, he may provide the state's attorney handling the offense with a considerable tactical advantage.<sup>201</sup> To remedy this inequitable situation, some states have set up a form of use immunity for revocation hearings.<sup>202</sup> Maryland to date has not adopted this approach. Although some judges in Maryland are sensitive to this problem and may postpone a hearing until the criminal trial has been completed,<sup>203</sup> the possibility of prejudicing the probationer still exists.

#### F. Right to Counsel

*Scarpelli* made it clear that the presence of counsel at a revocation of probation hearing is both undesirable and constitutionally unnecessary.<sup>204</sup> The Court conceded, however, that in certain cases, the touchstone of due process, fundamental fairness, would require the state to provide counsel for indigent probationers:<sup>205</sup>

[C]ounsel should be provided in cases where, after being informed of his rights to counsel, the probationer or parolee makes such a request, based upon a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.<sup>206</sup>

Despite the limitations placed on the right to counsel at a revocation

199. Comment, "Catch-22": *A Probationer's and Parolee's Choice Between the Right to be Heard and the Privilege Against Self-Incrimination*, 9 PAC. L.J. 949, 968 (1978).

200. *Id.* In fact, the United States Court of Appeals for the Sixth Circuit had held that the accused's silence at a revocation hearing may be used against him. *United States v. Farmer*, 512 F.2d 160, 162 (6th Cir. 1975).

201. Comment, "Catch-22": *A Probationer's and Parolee's Choice Between the Right to be Heard and the Privilege Against Self-Incrimination*, 9 PAC. L.J. 949, 959-60 (1978).

202. *See id.* at 960. *See also* *McCraken v. Corey*, 612 P.2d 990 (Alaska 1980); *People v. Coleman*, 533 P.2d 1024 (Cal. 1975); *Stave v. DeLomba*, 117 R.I. 673, 370 A.2d 1273 (1977). *But see* *United States v. Rillet*, 595 F.2d 1138 (9th Cir. 1979).

203. *See* Interview with Judge Klavan, *supra* note 118. Note also that most agents wait until there has been an adjudication before requesting a revocation hearing. *See* Survey, *supra* note 63.

204. 411 U.S. 778, 789-91 (1973).

205. *Id.*

206. *Id.*

hearing, Maryland has gone further than is constitutionally required and now provides for legal representation in all revocation hearings. Prior to the recent decision of *State v. Bryan*,<sup>207</sup> however, only parolees were afforded this right.<sup>208</sup> In *Bryan* the court of appeals construed Maryland Rule 723 to encompass probation revocation hearings.<sup>209</sup> Consequently, a probationer who appears for a revocation hearing without counsel must be advised fully of his right to counsel according to rule 723(b) and, similarly, cannot waive the right to counsel without complying with the waiver inquiry provision in rule 723(c).<sup>210</sup> However, if the probationer continues to appear without an attorney after having been advised of his right to counsel, he will be deemed to have waived that right.<sup>211</sup>

### G. *Neutral and Detached Hearing Body*

Pursuant to *Morrissey* and *Scarpelli*, an administrative hearing conducted by a non-judicial officer will satisfy the minimal constitutional requirements for a "neutral and detached hearing body."<sup>212</sup> Here, as in the case of the right to counsel, the Maryland probationer is afforded more than is constitutionally mandated by being provided a hearing before a judge.<sup>213</sup> This may, however, work to the probationer's disadvantage, since the judge who presides over the revocation hearing is the same person who granted probation initially.<sup>214</sup> Consequently, it might be argued that the accused probation violator is prejudiced by the judge's familiarity with the accused's criminal background. While no Maryland cases have raised such a challenge, jurisdictions that have addressed the issue have found such challenges unpersuasive for two reasons. First, the original sentencing judge is more familiar with the case and therefore is in a better position to determine the likelihood of the probationer's successfully completing the probationary period.<sup>215</sup> Second, because the original sentence was suspended, the judge has not technically completed his sentencing responsibilities until either the period of probation is completed or the determination to revoke probation has been made.<sup>216</sup> Therefore, determining whether any of the conditions of probation have been breached and, if so, whether probation should be revoked remains within the purview of the sentencing judge, unless he is unable to make such a

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207. 284 Md. 152, 395 A.2d 475 (1978).

208. MD. ANN. CODE art. 27, § 642 (Supp. 1981).

209. 284 Md. 152, 154-55, 395 A.2d 475, 477 (1978).

210. *See id.*

211. MD. R.P. 723(d)(2); *see State v. Diggs*, 24 Md. App. 681, 693, 332 A.2d 283, 290 (1975).

212. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

213. *See MD. ANN. CODE art. 27, §§ 641A, 643A* (1976).

214. *Id.* § 643A(d).

215. *Smith v. State*, 598 P.2d 1389 (Wyo. 1979).

216. *Id.*

determination due to illness or other good cause shown.<sup>217</sup>

#### H. *The Determination of Whether the Probationer is Guilty of Violating the Conditions of Probation*

Determining whether one or more conditions of the probation order have been violated is a factual question that involves far less subjectivity than the ultimate decision of whether probation should be revoked.<sup>218</sup> The judge must decide whether the probationer's conduct while on probation has complied with the probation agreement.<sup>219</sup> Unlike a criminal trial, this determination need not meet the "beyond a reasonable doubt" standard.<sup>220</sup> As a result, a probationer who is charged with the commission of a new offense during the period of probation may be found to have violated his probation contract even though he is found not guilty of that offense at a criminal trial.<sup>221</sup> The

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217. MD. ANN. CODE art. 27, § 643A(d) (1976). If the original sentence was a PBJ or a generally suspended sentence, a new judge may impose any sentence he wishes, including an extended period of probation supervision so long as it does not exceed the statutory maximum for the particular offense involved. *Id.* § 642 (1976 & Supp. 1981).

218. *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972).

219. *Scott v. State*, 238 Md. 265, 272, 208 A.2d 575, 579 (1965) (citing *Manning v. United States*, 161 F.2d 827 (5th Cir.), *cert. denied*, 332 U.S. 792 (1947)).

220. *See id.* at 275, 208 A.2d at 580.

221. *Id.* In most cases, the agent will wait until there is a conviction before requesting a revocation hearing. *Survey*, *supra* note 63. By doing so, the agent need only present a certified copy of the conviction to prove that the probationer violated rule 4 of his probation contract. The probationer's probation may be revoked on the basis of a new conviction even if that conviction has been appealed and the appeal has not yet been heard. *Hutchinson v. State*, 44 Md. App. 182, 184-87, 407 A.2d 359, 361-62 (1979), *aff'd*, 292 Md. 367, 438 A.2d 1335 (1982). However, if the conviction is reversed on appeal, then the order to revoke probation must also be reversed, if that conviction served as the sole basis for the revocation. *Id.* Compare *Hutchinson v. State*, 44 Md. App. 182, 407 A.2d 359 (1979), *aff'd*, 292 Md. 367, 438 A.2d 1335 (1982) with *Scott v. State*, 283 Md. 265, 208 A.2d 575 (1965) (independent evidence needed to prove illegal activity).

When the order to revoke probation is reversed, a question as to the applicability of the double jeopardy doctrine may arise if the agent then attempts to revoke probation, not on the basis of the conviction itself, but on independent evidence. The double jeopardy question has not been addressed in Maryland and only a few states have addressed the applicability of the doctrine in the revocation hearing setting. *See 7 AM. J. CRIM. L.* 277 (1979). Those courts that have addressed this issue have ruled that the principle of double jeopardy would not be violated. *State v. Simmerman*, 118 Ariz. App. 298, 576 P.2d 157 (1978); *Marutzky v. State*, 514 P.2d 430 (Okla. Crim. App. 1973); *Bass v. State*, 501 S.W.2d 643 (Tex. Crim. App. 1966). In all three cases, a warrant for violation of probation was sought on the basis of a new arrest. Hearings were held prior to adjudication of the new offenses and, in each case, the evidence presented at the revocation hearings was insufficient to constitute a crime. The probationers in each case, however, after being found guilty of their respective crimes, were brought back for a revocation hearing on the basis of the same rule infraction and on the basis of the same conduct. However, because the conviction itself served as the basis of the breach of probation, the courts held that such evidence was sufficiently different to overcome any double jeopardy challenge. *State v. Simmerman*, 118 Ariz. App. 298, 576 P.2d 157 (1978); *Marutzky v. State*, 514 P.2d 430 (Okla. Crim. App.

converse of this situation may also occur.<sup>222</sup> A probationer may be found not guilty of having violated his probation, even though he has been convicted of a new offense. Under the holding in *Swan v. State*,<sup>223</sup> a probationer need only conduct himself as would the average citizen.<sup>224</sup> Consequently, a very minor infraction of the law will not be deemed a violation of probation.<sup>225</sup>

### I. Mitigation

Once it is determined that a violation of probation has been committed, the court still must make a decision as to whether probation should be revoked.<sup>226</sup> Before making such a determination, the court must allow the probationer the opportunity to present mitigating evidence.<sup>227</sup>

The most persuasive evidence that can be offered in mitigation is that volunteered by the probation agent.<sup>228</sup> If the agent recommends that the probationer be continued on probation supervision, the court will probably follow that recommendation.<sup>229</sup> In many instances, however, the agent has already provided the probationer several opportunities to prove himself worthy of remaining under probation supervision.<sup>230</sup> Therefore, once a revocation hearing is ultimately sought by the probation agent, it is unlikely that the agent will recommend that probation be continued. The agent may, nevertheless, still be willing to testify to some redeeming aspect of the probationer's conduct, attitude, or personality. This may prove beneficial, even in cases in which revocation is inevitable, since the Maryland legislature has granted judges considerable latitude in determining when, where, and how much of the originally imposed sentence must be served.

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1973); *Bass v. State*, 501 S.W.2d 643 (Tex. Crim. App. 1966). It should also be noted that one jurisdiction has found the double jeopardy principle inapplicable at a revocation hearing regardless of whether the evidence presented is the same as that at a prior revocation hearing. *Davenport v. State*, 574 S.W.2d 73 (Tex. Crim. App. 1978). For a criticism of this view, see 7 AM. J. CRIM. L. 277 (1979).

222. *Swan v. State*, 200 Md. 420, 427, 90 A.2d 690, 692 (1952). Furthermore, when a probationer is on probation from two different courts (different judges), what one judge determines to be grounds for revocation may be determined to be insufficient by another. See *McGaughey v. United States*, 467 F. Supp. 1 (W.D. Mo. 1978).

223. 200 Md. 420, 90 A.2d 690 (1952).

224. *Id.* at 427, 90 A.2d at 693.

225. *Id.*

226. *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972).

227. *Id.* at 488.

228. Survey, *supra* note 63.

229. *Id.*

230. Probation agents rarely request a revocation hearing unless a new offense has been committed or numerous technical violations have occurred. *Id.* See also *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972).

*J. Decision to Revoke*

Pursuant to *Morrissey* and *Scarpelli*, the court must notify the probationer of the evidence relied upon to reach the ultimate determination that probation should be revoked.<sup>231</sup> The court may order the execution of the originally imposed sentence and, in the majority of states, the court need not give any credit for the time spent on probation supervision.<sup>232</sup> Although Maryland law is technically in accord with the majority position, the enactment of article 27, section 642, in 1978, provides judges with the option of executing judgment on all or any portion of the original sentence.<sup>233</sup> Consequently, section 642 may be more favorable to the probationer than a statute granting credit for time served under supervision, particularly if the sentence originally imposed is substantially greater than the time already spent on probation supervision.

In addition to the power to execute any portion of the original sentence, the court may order its sentence to run concurrently with any other sentence that the probation violator is presently serving.<sup>234</sup> Furthermore, the judge must specifically state on the record that the sentence is to run consecutively with any existing sentence, or it will be presumed that he intended it to run concurrently.<sup>235</sup>

Besides the length of the sentence to be served, the judge is also allowed, in some instances, to determine the manner in which the sentence will be served. For example, in Prince George's County, a sentence at a local detention center can, if the judge orders, be served on weekends.<sup>236</sup> In Queen Anne's and Anne Arundel Counties, the prisoner may be permitted to leave detention during working hours.<sup>237</sup> Similarly, in Montgomery County, a judge may recommend that an offender be placed in a pre-release center, a minimum security facility from which the prisoner is permitted to leave for purposes of employment.<sup>238</sup> Finally, in Baltimore City, a probationer sentenced to the city

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231. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). Such notification need not be given the probationer "in writing," so long as the reasons for revocation clearly appear on the court record. *See State v. Hughes*, 200 N.W.2d 559 (Iowa 1972); *Pearson v. State*, 308 Minn. 287, 241 N.W.2d 490 (1976); *State v. Nichols*, 480 Ohio App. 2d 330, 357 N.E.2d 417 (1976).

232. In most jurisdictions, there is no credit given for time spent on probation. *See* cases cited in 24 C.J.S. *Criminal Law* § 1995(8) nn.33-39 (1962 & Supp. 1980).

233. MD. ANN. CODE art. 27, § 642 (Supp. 1981).

234. *State v. White*, 41 Md. App. 514, 515-16, 397 A.2d 299, 300-01 (1979). The judge may not increase the originally imposed sentence. *Id.*

235. *Id.* at 516, 397 A.2d at 302; *see Kaylor v. State*, 285 Md. 66, 70-71, 400 A.2d 419, 422-23 (1979).

236. MD. ANN. CODE art. 27, § 639 (Supp. 1981).

237. *Id.* § 639A (1976).

238. *Id.* § 645T. Before the judge's recommendation will be implemented, the deputy director of the pre-release center must also determine that the individual is a suitable candidate. *Id.*

jail may be permitted to leave for educational purposes.<sup>239</sup> He may even be permitted to serve his sentence in a halfway house.<sup>240</sup>

### K. Right to Appeal

Absent a statutory provision creating such a right, a probationer has no constitutional right to an appeal from a revocation hearing.<sup>241</sup> The Maryland courts, however, have construed a right to appeal pursuant to the Courts and Judicial Proceedings Code Annotated, section 12-301.<sup>242</sup> The courts have reasoned that an order revoking probation and reinstating a previously suspended sentence is a "final and appealable judgment for the purpose of appellate review."<sup>243</sup> Recently, in *State v. Kupfer*,<sup>244</sup> the court of appeals went still further and declared that even a modification of the conditions of probation is sufficiently final to establish the probationer's right to appellate review.<sup>245</sup>

## V. CONCLUSION

Although probation has existed as an alternative to incarceration for nearly a century, until relatively recently, probationers have been denied even the most basic of due process protections. A series of Supreme Court decisions beginning in the late 1960's, however, indicated that the rationales used to deny probationers many of the rights afforded the average citizen were invalid. Although these cases dealt primarily with the revocation setting, they affected the entire proba-

239. *Id.* § 645W (Supp. 1981).

240. *Id.*

241. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *McKane v. Durston*, 153 U.S. 684, 687-88 (1894).

242. MD. CTS. & JUD. PROC. CODE ANN. § 12-301 (1980).

243. *Kupfer v. State*, 287 Md. 540, 542, 414 A.2d 907, 908 (1980); *Burch v. State*, 278 Md. 426, 428-29, 365 A.2d 577, 578-79 (1976); *Skinker v. State*, 239 Md. 234, 235-36, 210 A.2d 716, 717 (1965); *Swan v. State*, 200 Md. 420, 425, 90 A.2d 690, 692 (1952). Appeals from the district courts are taken to the circuit courts or to the Criminal Court for Baltimore City. They are tried *de novo*. See *Burch v. State*, 278 Md. 426, 428-29, 365 A.2d 577, 578-79 (1976); *Williams v. State*, No. 37302070 (Crim. Ct. Balt. City May 23, 1974).

An appeal from the revocation hearing can only be based on errors committed in the revocation hearing, rather than errors made at the original trial. See note 54 and accompanying text *supra*. Furthermore, the appellate review of an order of a circuit court or the Criminal Court for Baltimore City revoking probation will normally be limited to determining whether the "discretion of the trial judge has been abused in any way, or whether an erroneous construction has been placed by the trial judge on the conditions of the probation." *Burch v. State*, 278 Md. 426, 431, 365 A.2d 577, 578-79 (1976). However, because appellate review of district court determinations is *de novo*, the scope of the review will be somewhat greater. *Id.*

244. 287 Md. 540, 414 A.2d 907 (1980).

245. *Id.* at 542-43, 414 A.2d at 908. In *Kupfer*, the probationer had been found guilty of violating probation, but was continued on probation for an extended period of time. *Id.* Although probation was not actually revoked, the court of appeals held that such a determination was sufficiently final in nature to hear his appeal. *Id.*

tionary process. The rights of the Maryland probationer have unquestionably expanded since these Supreme Court decisions and, in many instances, exceed the rights granted probationers in other jurisdictions.

At the disposition phase, the Maryland probation candidate is allowed greater access to pre-sentence information than is afforded probationers in most other states. In addition, if probation is deemed appropriate, the court may choose from a wide variety of probationary forms. The accused may even be granted an opportunity to escape the stigma of a criminal conviction altogether, as well as have his arrest record expunged, if he successfully completes probation under a PBJ disposition.

The Maryland probationer also appears to have acquired more rights in the supervision phase of probation. First, it seems that the Maryland probationer has greater protection against illegal searches and seizures than is afforded probationers in many other jurisdictions. Second, any modification of the terms of the probation must be accompanied by a hearing. Last, Maryland probation agents appear to allow probationers considerable latitude in carrying out the conditions of the probation contract.

The rights given a Maryland probationer during a revocation hearing also appear to be progressive, particularly when compared with the minimum due process requirements dictated by *Morrissey* and *Scarpelli*. The Maryland probationer is afforded a full hearing before a judge, and the probationer is automatically provided the assistance of court appointed counsel if he cannot afford to hire an attorney. There is even some indication that the Maryland courts may, in future cases, require greater formality in the state's presentation of evidence against the probationer. Most significantly, a Maryland judge, having made the determination that probation should be revoked, has many options if he decides to alter the manner in which the original sentence is to be implemented. Finally, the Maryland probationer is provided the opportunity to appeal a determination made at a revocation hearing, even if that decision involves only a modification of the terms of probation.

In conclusion, the Maryland probationer, although required to endure many restrictions upon his freedom, is nonetheless in a relatively advantageous position when compared with his counterpart in other jurisdictions. Whether this progressive trend will continue remains unclear.

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